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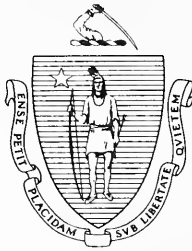
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JUDICIAL COUNCIL OF MASSACHUSETTS

SS.
CS.
LL.



51st REPORT 1975

THE COURTS NEED HELP!
MORTGAGE FORECLOSURES
SPEEDY TRIALS FOR CRIMINAL DEFENDANTS
THE RIGHT TO A PUBLIC TRIAL

(Complete Table of Contents on Pages 1-3)

MEMBERS OF THE COUNCIL (JANUARY, 1976)

THOMAS D. BURNS *of North Andover*
LAWRENCE F. FELONEY *of Cambridge*
JACOB LEWITON *of Belmont*
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BERGE TASHJIAN *of Westboro*
JAMES L. VALLELY *of West Newton*

JAMES B. MULDOON *of Weston, Secretary*
Two Center Plaza, Boston, Mass. 02108

INQUIRIES CONCERNING THE JUDICIAL COUNCIL

This report is distributed by the Public Document Room at the State House in Boston. Copies are sent to all members of the legislature, judges, clerks of court, libraries, city and town clerks, and many others. As long as the supply lasts, copies of this report and also copies of some earlier reports can be obtained, without charge, by requesting them from the Public Document Room, State House, Boston, Massachusetts 02133.

Persons interested in matters under consideration by the Judicial Council and in the improvement of the judicial system of the commonwealth are invited to communicate with the Secretary of the Judicial Council, James B. Muldoon, 2 Center Plaza, Boston, Massachusetts 02108.

Message by Chief Justice Edward F. Hennessey

The Judicial Council has labored for more than half a century for the improved administration of justice in Massachusetts and, as I begin my tenure as Chief Justice of the Supreme Judicial Court, I have come to a fuller appreciation of those labors.

More important, however, is the need to build upon the foundations of past accomplishments to perfect our judicial system in order to meet the expectations of our citizenry. In this effort, I look forward to the informed participation of the Judicial Council.

The accomplishment of lasting judicial reform will require the continuing involvement over an extended period of time of a number of public and private bodies. It will not come quickly, simply and in one fell swoop. Its accomplishment will require both diligence and perseverance.

The Judicial Council, as a permanent, statutory body, can continue to render a valuable service in this undertaking through its own efforts and in close cooperation with other bodies such as the Judicial Conference and the Select Committee on Judicial Needs.

Through such efforts, combined with judicial and executive leadership, public support and legislative responsiveness, lasting judicial reform will become a reality in Massachusetts.

I have, as you know, proposed several emergency measures for immediate implementation to meet the most pressing needs of our judicial system and, in effect, to "buy time" for the consideration of more fundamental reforms. It is this latter function, the proposal of long-range improvements in the organization and administration of our courts, in which the Judicial Council can best serve the Commonwealth.

I hope and trust that the Judicial Council with its five decades of experience, will, despite the uncompensated service of its members, be able to contribute its insight and guidance to sustain the momentum for judicial reform in Massachusetts.

Edward F. Hennessey
Chief Justice
Supreme Judicial Court
of Massachusetts



51st REPORT

Judicial Council of Massachusetts

— 1975 —

CONTENTS OF THIS REPORT

THE ACT CREATING THE JUDICIAL COUNCIL 4

MEMBERSHIP OF THE JUDICIAL COUNCIL cover

TABLE OF LEGISLATION REFERRED TO
THE JUDICIAL COUNCIL 5

TABLE OF DRAFT ACTS RECOMMENDED BY
THE JUDICIAL COUNCIL TO THE
GENERAL COURT.....162

INDEX OF 1976 HOUSE AND SENATE BILLS
ON SUBJECTS DISCUSSED IN THIS REPORT 8

I. GENERAL OBSERVATIONS ON THE
JUDICIAL SYSTEM..... 10

A. Phase Out of Special Justices of the District Courts 10

B. Limited Service by Certain Retired Probate and
Superior Court Judges..... 11

C. More Superior Court Judges Now..... 11

D. Judicial Removal and Discipline 12

E. The Judicial Nominating Commission..... 13

F. The Trial De Novo System — an Antique 13

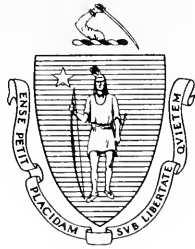
G. The Court Facilities Study..... 20

H. Judicial Administration..... 30

I. Court Unification 34

J. The Circuit Judge of Probate Concept 36

II. CRIMINAL LAW AND PRACTICE.....	37
A. Speedy Trial of Criminal Defendants.....	37
B. The Right of Privacy and the Right to a Public Trial — The Rape Victim and The Criminal Justice System.....	45
C. Evidence — Accident Report Inadmissible Against Maker	52
D. Misdemeanors — Issuance of Citations by Police Officers	53
E. Reorganizing the System of Probation in the Commonwealth.....	65
F. Penalties for Obstruction of Justice	72
III. PROBATE	76
A. Rights of Illegitimate Children.....	76
B. Rights of Elderly Persons — Appointment of Conservators	109
C. Public Conservators	111
IV. PROPERTY	115
A. Mortgage Foreclosures — Self-Help or Judicial Review?	115
B. Acquisition of Certain Graves by Municipalities.....	147
C. Conveyance of Land — Necessity of Acknowledg- ment by Grantee.....	148
D. Tenancies of Two or More in Personal Property	151
V. CIVIL ACTIONS AND PRACTICE IN THE COURTS ..	154
A. Unauthorized Practice of Law — Credit Counsel- ing Corporations	154
B. Consumer's Council — Authority to Pursue Civil Remedies.....	158
C. Action to Reach and Apply	159



The Commonwealth of Massachusetts

January, 1976

THE HONORABLE MICHAEL S. DUKAKIS
Governor of Massachusetts

Dear Governor Dukakis:

In accordance with the provisions of Chapter 221, Section 34A of the General Laws, we have the honor to transmit the fifty-first report of the Judicial Council for the year 1975.

THOMAS D. BURNS
LAWRENCE F. FELONEY
JACOB LEWITON
FREDERICK M. MYERS, JR.
ALFRED L. PODOLSKI
WILLIAM I. RANDALL
PAUL T. SMITH
JACOB J. SPIEGEL
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JAMES L. VALLELY

JUDICIAL COUNCIL**G.L. (Ter. Ed.) Chapter 221, §§34A-34C**

The Judicial Council Was Established To Make A Continuous Independent Study Of The Organization, Procedure, And Practice Of The Courts.

The Council Makes Recommendations Requested By The Legislature And Suggests Improvements In The Administration Of Justice.

Statutory Authority

Section 34A. There shall be a Judicial Council for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the Commonwealth, the work accomplished, and the results produced by that system and its various parts. Said council shall be composed of the chief justice of the supreme judicial court or some other justice or former justice of that court appointed from time to time by him; the chief justice of the superior court or some other justice or former justice of that court appointed from time to time by him; the judge of the land court or some other judge or former judge of that court appointed from time to time by him; the chief justice of the municipal court of the city of Boston or some other justice or former justice of that court appointed from time to time by him; one judge of a probate court in the Commonwealth and one justice of a district court in the Commonwealth and not more than four members of the bar all to be appointed by the governor, with the advice and consent of the executive council. The appointment by the governor shall be for such periods not exceeding four years, as he shall determine.

Section 34B. The Judicial Council shall report annually on or before December first to the governor upon the work of the various branches of the judicial system. Said council may also from time to time submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable.

Section 34C. No member of said council, except as hereinafter provided, shall receive any compensation for his services, but said council and the several members thereof shall be allowed from the state treasury out of any appropriation made for the purpose such expenses for clerical and other services, travel and incidentals as the governor and council shall approve. The secretary of said council, whether or not a member thereof, shall receive from the Commonwealth a salary of ten thousand dollars.

**1975 HOUSE AND SENATE BILLS
REFERRED TO THE JUDICIAL COUNCIL**

1975 Bill Number	1975 Resolve Chapter	Subject Matter	Page In This Report
S 678	12	Reorganizing the system of probation in the Commonwealth.....	65
S 901	30	An act protecting the right of privacy of rape victims in courtroom proceedings.....	46
S 928	27	An act relative to the rights of children born out of wedlock.....	76
S 947	15	An act providing for a judicial procedure for the foreclosure of real estate mortgages	124
H 62	27	An act establishing a civil paternity action, and prohibiting discrimination against children born out of wedlock.	86
H 374	15	An act providing for an adversary hearing before the foreclosure of a mortgage.....	122
H 614	30	An act providing for the exclusion of the public from trials of certain sex offenses.....	45
H 1080	24	An act providing that municipalities may acquire certain graves of which the ownership is unknown	147
H 1153	28	An act providing for the repeal of Chapter 221, §46D of the General Laws relative to the authority of credit counselling corporations to engage in the practice of law.....	154
H 1348	20	An act requiring a certificate of acceptance of a deed as a prerequisite to recording.	148

1975 Bill Number	1975 Resolve Chapter	Subject Matter	Page In This Report
H 1530	16	An act providing that an accident report not be used in evidence against the person making such report	52
H 1710	30	An act relative to the exclusion of the general public from courtrooms during trials of certain proceedings involving the crime of rape	46
H 1940	27	An act providing for public conservators	111
H 2299	19	An act providing for the speedy trial of criminal defendants	37
H 2726	27	An act deleting the term "illegitimacy" from certain statutes	97
H 2965	18	An act further defining attachments of equitable interest	159
H 3154	27	An act clarifying the law respecting tenancies of two or more in personal property	151
H 3536	32	An act providing for the issuance of citations by police officers to person charged misdemeanors and violations of any ordinance and establishing an expeditious procedure for the prosecution and trial of such offenses	53
H 3682	15	An act providing for a judicial procedure for the foreclosure of real estate mortgages	116
H 4449	27	An act amending the laws pertaining to certain children	93
H 4833	20	An act providing that a deed must be signed by the grantee and acknowledged before a notary public	149

1975 Bill Number	1975 Resolve Chapter	Subject Matter	Page In This Report
H 5647	27	An act prohibiting mortgage fore- closures against certain unemployed persons.....	115
H 6019	21	An act enabling the consumer's council to seek civil remedies.....	158
H 6169	43	An act providing penalties for the crime of obstruction of justice.....	72

**INDEX OF SOME
1976 HOUSE AND SENATE BILLS
COVERED BY THIS
51st REPORT**

1976 Bill Number	Subject Matter	Page In This Report
<i>Senate Bills</i>		
602	Regulating the transfer of certain cases from the Superior Court to the Municipal Court of the City of Boston or other District Courts	29
629	Costs and expenses of operation of the Courts	36
636	Use of District Court judges and facilities to relieve Superior Court congestion	29, 30
638	Reference of civil actions to Masters in the Probate Courts	29, 30
644	Amend name of the Probate Court and the compensation of Probate Judges	36
649	Preservation of testimony in the Probate Courts...	30
653	Establishing the Commission on Judicial conduct..	13
654	Changing of Executive Secretary of the Supreme Judicial Court to the Administrative Office of the Massachusetts Courts	34
664	Strengthening the Administration of Justice in the Courts of the Commonwealth	13
675	Revising the method of selection of Judges to the District Courts.....	15
682	Nine additional Justices in the Superior Court.....	11
685	Qualifications of Judicial Officers and the vacating of office upon disbarment.....	13
696	Establishing the Commission on Judicial conduct..	13
698	Creating a Commission on Judicial conduct	13

1976 Bill Number	Subject Matter	Page In This Report
723	Establishing a Commission on Judicial conduct	13
758	Special Justices to sit in Superior Court in Criminal Misdemeanor sessions	29
<i>House Bills</i>		
320	Official Stenographers in the District Courts.....	30
321	Official Stenographers in the Probate Courts	30
323	Amending the Constitution to create a Judicial Qualifications Commission	13
453	Notice of sale to a mortgagor upon foreclosure under power of sale	115
516	Exclusion of the public from the trial of certain sex offenses	45
707	Creating a commission on Judicial conduct.....	13
708	Nominating Commission for appointment of all judges.....	13
889	Judicial grievance panels in each Judicial District of the Commonwealth	13
1598	Raising the initial amount of damages claimed in small claims from four hundred dollars or less to seven hundred and fifty dollars or less	30

I.

GENERAL OBSERVATIONS ON THE JUDICIAL SYSTEM

Pursuant to our statutory assignment to make a study of the judicial system of the Commonwealth and the results produced by that system, we have some general observations to make in addition to those which may be made in connection with the various specific legislative and other matters which we have studied during the past year.

(A) Phase Out of Special Justices of the District Courts

Outstanding among the accomplishments of the 1975 General Court in improving the Administration of Justice is a blueprint¹ for fulltime judicial service on the part of all District Court judges by July 1, 1979. Many special justices may elect fulltime service (and terminate their law practice) prior to that date; some may act quite soon. Some special justices may resign, preferring the full-time practice of law.

The District Courts of Adams, Amesbury, Lee, Leominster, Newburyport, and Winchendon became full time on January 1, 1976.²

Other District Courts to become "full-time" in 1976 are Great Barrington, Ipswich, North Adams and Williamstown. On July 1, 1977 Chicopee, Dukes (Martha's Vineyard), East Brookfield, Nantucket, Orange and Ware will be "full-time."

Because Ch. 862 of the Acts of 1976 provides that none of the 81 special justice positions existing on January 31, 1976, can ever be filled except by specific legislation, regardless of whether the special justice resigns, retires, dies, or becomes full time, it will be imperative that the General Court be kept fully informed as to judicial needs in the District Courts.

¹Acts of 1975, Ch. 862.

²Acts of 1975, Ch. 863.

**(B) Limited Service by Certain Retired
Probate and Superior Court Judges**

The Judicial Council has continually recommended legislation to permit temporary service by retired justices if such service has been requested by the Chief Justice of the court.

The General Court enacted legislation in 1975 to permit certain justices to be recalled for limited service.

By Ch. 861 of the Acts of 1975, sixteen retired justices of the Superior Court are now eligible for recall by the Chief Justice of the Superior Court for three month terms.

By Ch. 820 of the Acts of 1975¹ two retired probate judges are now eligible for recall by the Chief Justice of Probate for three month terms.

Some retired judges now serve as Masters and all may not be available for recall service. The new legislation will give a little help to both courts which can use any judicial man power that may be available. We need much more.

(C) More Superior Court Judges Now

Just prior to his appointment as the 19th Chief Justice of the Supreme Judicial Court, Justice Hennessey described the Superior Court as "bankrupt" and the six year wait for civil trials as "intolerable and indefensible." The Chief Justice did not overstate the situation. We can conceive of nothing which can substitute for an increase in the number of associate justices of the Superior Court.

Elsewhere in this report, we discuss the constitutional "Speedy Trial" requirements for the criminal. There is no speedy trial for the accident victim or the civil litigant. The installation in 1974 of the most modern rules of Civil Procedure has not even made a dent in the delay of five to six years before a case is reached for trial in the Superior Court.

The General Court must provide more associate justices for the Superior Court.²

¹The period of service of retired judges is limited by Acts of 1975, Ch. 820, to a two year period after they notify the Governor of their availability.

²S. 682 of 1976 would provide nine more justices.

(D) Judicial Removal and Discipline

Proposals for the establishment of a Judicial Conduct Commission have come before the General Court in the past two sessions.

We have commented on these proposals in our 49th Report for 1973¹ and in our 50th Report for 1974².

The legislation we recommend is as follows:

1975 DRAFT ACT

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Seventy-Six

PROPOSAL FOR A LEGISLATIVE AMENDMENT TO THE CONSTITUTION

Relative to the Discipline, Censure, and Removal of Judges

A majority of all the members elected to the Senate and House of Representatives, in joint session, hereby declares it to be expedient to alter the Constitution by the adoption of the following Article of Amendment, to the end that it may become a part of the Constitution (if similarly agreed to in a joint session of the next General Court and approved by the people at the state election next following):

ARTICLE OF AMENDMENT

The Constitution is hereby amended as follows:

Article 1. In addition to the provisions contained in chapter III and Articles of Amendment LVIII, XXXVII, and LXXV and in the manner which shall be provided by statute and notwithstanding the existing provisions of chapter III and Articles of Amendment LVIII, XXXVII, and LXXV, a judge of any court may be censured, suspended, or removed from his judicial office by the Supreme Judicial Court for conduct that brings the judicial office into disrepute, including but not limited to:

- (a) Conviction in a court of this or any other state or of the United States of a crime punishable as a felony or a crime involving moral turpitude; or
- (b) Willful misconduct in a judicial office; or

¹At pps. 39-67.

²At pps. 62-65.

- (c) Habitual failure to perform judicial duties; or
- (d) Habitual intemperance.

Several bills have been filed in 1976 relative to the establishment of a Commission on Judicial Conduct. Senate 685, Senate 698, House 323 and House 707 call for a constitutional amendment. Senate 653, Senate 696, and Senate 723, call for a Commission on Judicial Conduct without a constitutional amendment. House 889 goes even further and it establishes a grievance panel in each judicial district.

(E) The Judicial Nominating Commission Merit Selection of the Judiciary

In an Opinion of the Justices¹ on the subject of the selection and screening of candidates for judicial office, by a committee of citizens appointed "to advise the governor," it was held that such a procedure was not in conflict with the Massachusetts Constitution.

The governor is not necessarily bound to nominate only the nominees of the Commission. He may revoke the Executive Order creating this Commission in whole or in part, at any time.

The Governor's Council still must pass judgment on the person nominated.

The Commission will inspire confidence only so long as it insists on the highest standards of legal competence along with other exacting qualifications including experience and character.

House 708 of 1976 calls for a constitutional amendment establishing a Judicial Nominating Commission. In addition, there are proposals which would provide limited terms for the chief justices of the various court. Another proposal is that the chief justice of the Supreme Judicial Court shall designate the chief justices of the lower courts (Senate 664 of 1976).

(F) The Trial De Novo System — An Antique

Law "reform" is a continuing examination of existing institutions of the judicial system which sooner or later results in a change, often for the better.

¹Opinion of the Justices, Sept. 9, 1975; 1975 Adv. Sh. 2745.

No one ever issued a condemnation of the Trial De Novo system with more vehemence, and with more authority than did Justice Henry T. Lummus (who served on the Lynn District Court, the Superior Court and the Supreme Judicial Court) fifty-four years ago in 1922, when he gave this criticism: —

“Most of the faults of our district courts can be traced to two things — first, their want of power and responsibility, and, second, their isolation from each other.”

In the intervening years the General Court has done nobly and the administrative and judicial personnel of the district courts have done nobly to end their isolation from each other. Unfortunately they still suffer from a “want of power and responsibility.”

Justice Lummus continued: —

It is hard for a court without real power to respect itself. What good woodsman could remain such long, if set to pounding on a tree with the head of the axe? What sculptor could do good work if any passerby should be entitled by law to throw the statue into the harbor? Power and responsibility breed caution, judgment, sanity and efficiency; the want of power and responsibility produces the opposite effects.

The district courts are now the sole heirs of an absurd system of double trials of questions of fact, once so universal in Massachusetts that the losing party in a jury trial presided over by the full bench of the Supreme Judicial Court was entitled by law to a new trial by another jury before the same court.

A vicious circle has been created, by which incompetent men have been deemed worthy of district court judgeships because they carry little power, and then district courts have been denied more power because of the incompetence of some of the judges; — a kind of reasoning which, if maintained, would forever prevent reform.

His analysis of the historical basis of the district courts is excellent: —

The system of criminal appeals was designed for a small, homogeneous population, largely rural, with a simple civilization; and only the elementary common law crimes. It is not too much to say that it has broken down under the strain imposed upon it by our large, mixed urban population, and our numerous and varied crimes.

At no distant day criminal appeals will have to be abolished, and a system substituted by which a defendant submitting to trial in a district court must abide by the decision, subject to the correction of errors of law and to the summary revision of sentences thought to be excessive.

In the meantime our task is to do what we can with the present obsolete machinery.

The appeal in criminal cases, instead of being, as originally intended, a mode of review of findings and sentences honestly believed to be wrong, has been converted into a means of clogging the docket of the superior court with cases awaiting jury trial in the brief sittings provided, until in sheer desperation district attorneys and judges have sometimes disposed of cases upon terms dictated by criminal defendants.

Is it not almost eerie to hear these words echoing down to us over fifty years ago when they so aptly described the horrendous situation of 1976?

Lummus further analyzed the situation then, and his words apply today:

... several indefensible notions have sprung up. One is, that a defendant is entitled to know the ultimate disposition of his case before he pleads guilty — that the sovereign state should permit him to impose conditions as to its judicial action. Another is, that the court is bound to abdicate its duty to determine the sentence, whenever the district attorney and the defendant are agreed. A third notion is, that the real question to be decided on appeal is the amount of deduction from the district court sentence, the defendant holding a virtual policy of insurance against the imposition of any greater penalty; the district court sentence, though annulled for every other purpose, is deemed sacred as fixing the maximum.¹

In the intervening years the competence of those appointed to district court judgeships has vastly improved. The salary scale exceeds \$30,168.00 and by 1979 all such judges will serve as full time judicial officers. The time nears for further reform.

Lummus said then, and we can say now:

A judge of a district court finds his decisions swept aside without reason, but he can never be convicted of legal error. He lacks responsibility as well as power.

In view of the degenerating force of the appeal system upon our district judges, the wonder is that, working under that system, so many of them have maintained such a high standard of public service.

¹For example Ch. 459 of the Acts of 1975, Sec. 2 provides: Whenever a person convicted before a district or municipal court is sentenced to fine, imprisonment, or fine and imprisonment and said court has directed that the execution of sentence be suspended and the defendant has taken an appeal to superior court, the court which imposed sentence shall not, at any time, increase the penalty or withdraw or revoke the suspension in said sentence.

Approved July 11, 1975.

In 1922 Lummus noted: —

Another unwise practice is the crusading against some particular kind of offenders, like violators of the liquor law, by means of jail sentences for first offences, invariably appealed and impossible to sustain in the superior court without congesting the list so that no other business can be done. Everybody knows — including the judge taking such action — that a district court so acting is not doing its work as a part of our judicial system, but is merely unloading its work upon the superior court with a virtuous but meaningless gesture of enforcement of the law. Any notion that such action strikes terror into the hearts of wrongdoers, is a delusion; it only brings our criminal justice into disrepute.

A local judge who does not take pains to learn the best practices in other courts, may unconsciously begin to look for advice and interchange of ideas to his clerk, or the chief of police, or some local reformers, all of whom he ought to keep at arm's length so far as the disposition of cases is concerned. The loss of judicial independence is easy; the consequences are deplorable.

If any greater penalty is imposed on appeal, the cry is raised that a defendant should not be penalized for exercising his right — usually misdescribed as a constitutional right — of appeal. If that cry meant that a defendant, no matter how or why he delays conviction and sentence, should not be given more than a reasonable sentence for his crime, it would suggest a sound doctrine.

But that is not the meaning intended. The proposition implied in that cry is, that there should be no difference in penalty between one man who confessed his guilt, possibly expressed his contrition, and accepted his penalty in the district court, and another man — guilty as he must be deemed to be else he would not be before the superior court for sentence — who has fought and delayed to the bitter end, and has cost the public valuable time and hundreds of dollars before justice could overtake him.

Such a proposition seems self-evidently absurd. It runs contrary to the customs of the profession for generations. The right of appeal is surely no more sacred than the right of an indicted defendant to be tried by a jury; yet from time immemorial defendants who turn state's evidence, or plead guilty when arraigned, have claimed and received more clemency than those who fight to the last ditch. Everyone knows that criminal sittings cannot be run, in practice, on any other theory. Recently in a criminal sitting of fifteen court days I found four hundred cases, most of them arising on appeal, on the list for jury trial. Possibly there was time to try thirty cases — not more. Ninety per cent of criminal defendants in

the superior court, if not more, are unquestionably guilty. So long as every defendant, even in the smallest case, has a constitutional right to trial by jury, there are only two ways of disposing of any considerable volume of criminal business — a tremendous enlargement of judicial and legal machinery, or some means of inducing the great mass of criminal defendants, in fact guilty, to waive their technical rights and to plead guilty. Practically, unless defendants are prevented from gaining any assurance that their cases will not be reached for trial during the sitting, and the court, without descending to trading with defendants, nevertheless brings home to them the advantage of pleading guilty instead of being found guilty, the court and the public who maintain it will inevitably be swamped by ever-increasing arrearages of untried cases.

There are those who oppose “plea bargaining.” The alternative is a capacity for a prompt district court trial. In the absence of this, plea bargaining may go on at a higher level.

The General Court may soon be asked, or in fact may be required to abolish the trial *de novo* system and to provide for the final determination of criminal cases within the jurisdiction of the district courts at that level, and with a jury. It may be a six man jury if it is finally determined that there is no constitutional barrier involved.

If the General Court does adopt such a plan, the district courts may be close to the stage of their development when there is a reasonable chance that it will work. Once and for all the “want of power and responsibility” on the part of district court judges in the average criminal case will end for all time and the pleas made by Lummus in 1922, and by a legion of others, will be heard. In judicial reform there may be little new under the sun, but the time may be right for the idea to become a reality.

As we indicate in this report, the two-tier system in Massachusetts has made it possible for District and Municipal Courts to dispose of approximately 92% of all of the substantial criminal complaints without adding to the burden of the Superior Court. In the fiscal year ending June 30, 1975, the District Court judges handled 208,562 criminal complaints, which could be called substantial. Out of this number, 16,487 were appealed to the Superior Court, or approximately 8%.

The necessity of preserving this capacity of District and Municipal Courts to dispose similarly of approximately 90% of all crimi-

nal complaints in the future must be given careful consideration in connection with any proposal to change the present systems of handling criminal cases.

Although the statistics given here for the District Court do not include the Municipal Court of the city of Boston, they are sufficient to indicate the situation in that court as well.

It is difficult to estimate the number of jury trials which might take place in the District and Municipal Courts if the *de novo* was abolished.

We regard it as necessary to have a study made of the experience in other judicial systems in states which have departed from the *de novo* idea. We should, therefore, consider what has happened in states with large populations, which have conditions resembling those in Massachusetts, such as New Jersey, Illinois, Pennsylvania, Michigan, California, etc.

Statistics on this subject which deal with the situation in more rural states such as Maine and Rhode Island are of less value to us.

The Constitutional Issue

On June 12, 1975, the Supreme Judicial Court held in *Comm. v. Ludwig*¹ that trials “*de novo*” were not infractions of the right to a speedy trial under the Sixth Amendment and Article 12 of the Massachusetts Declaration of Rights, and the guarantee against double jeopardy under the Fifth Amendment. This case has been appealed to the U.S. Supreme Court (*Ludwig v. Mass.* U.S.S. Ct. No. 75-377) where defendant’s counsel apparently hopes to have the “two-tier” or “trial *de novo*” system declared constitutionally infirm.

In the *Ludwig* case and in other similar proceedings such as *Comm. v. Whitmarsh*² and *Costarelli v. Massachusetts*³ defense counsel contends, thus far without success, that the failure to give a jury trial in the first instance, in the District Court, violates the United States and Massachusetts constitution.

We do not wish to anticipate what the U.S. Supreme Court will do in the *Ludwig* case. We noted in our last report, the decision in *Colten v. Kentucky*, 407 U.S. 104 (1972) where a *de novo* procedure was upheld and saw no constitutional problems.

¹1975 A.S. 1994, 330 N.E. 2d 467

²1974 A.S. 1408, 316 N.E. 2d 610

³95 S. Ct. 153A (1975)

A special committee of district court judges has issued a printed report on "Trial de Novo" in which it is said:

In summary, because the District Court defendants presenting the most serious danger to society comprise the large majority of those who appeal to the Superior Court, and because those appeals generally produce mild dispositions after unreasonable delays, the public interest in effective law enforcement may be ill-served by the de novo system despite its function as a useful screening mechanism.

The district courts now finally dispose of 97% of the criminal cases entered in those courts, but apparently only 92% of "judge handled" cases. If jury trials are to be held in criminal cases in the district courts, we might expect well over 2,000 such jury trials per year on the basis of current statistics showing that 1,912 such cases on appeal from the district courts were tried before a jury in the Superior Court in the fiscal year ending June 30, 1975.

We must note that in the 1,912 jury trials mentioned, the defendant already knew what the judgment of the district court was. It may be concluded that *more* defendants would seek jury trials in the district court if they were only going to get "one bite at the apple." A good number would prefer to take their chance with a jury.

The district courts do not have the immediate capacity to provide jury trials if the de novo system is eliminated, but the capacity could be developed. Last year we recommended that the General Court look to the day when this matter must be faced. We renew this suggestion.

The Plea Bargaining Issue

In his final observation on the judicial system after ten years as Chief Justice of the Supreme Judicial Court, Justice Tauro said that the de novo system led to the increased use of plea bargaining.

There being no finality in the District Court non-jury criminal trial, and in view of the constitutional necessity for a speedy trial in every criminal case, many believe that the de novo system is now inappropriate. It often works to the advantage of the criminal and always delays the disposition of the case. Prosecutors in the Superior Court may be agreeing to lighten penalties in order to avoid being buried in an avalanche of cases.

Finality at the district court level, at least in certain classes of

crime, might result in prompt and final dispositions of more value to society.

It is not without probability that plea bargaining in the District Court would intensify if there was an increase in jury trials at that level.

(G) THE COURT FACILITIES STUDY

In September of 1975, the National Center for State Courts filed a final summary report on the facilities of 114 Courts in the Commonwealth. Separate studies have also been completed on each Superior and District Court. A distinct study of the Suffolk County Court was made in 1974 by Space Management Complex Inc., which has published a separate report.

These facilities studies can be of great value to the General Court and others in planning for alterations in existing facilities and for the construction of new facilities. Some of the major deficiencies in existing facilities include:

1. Overcrowding	35%
2. Poor Acoustics and Noise	35%
3. Poor lighting	32%
4. Inadequate Electricity	9%
5. Poor Appearance	7%
6. Leakage — Water Damage	7%
7. Fire Hazards	5%
8. Inadequate Heating	5%
9. Inadequate Parking	3%
10. Poor Structure Condition	1%

Functional Deficiencies

- 1. Inconvenient to the Public
- 2. Lack Public Transportation (11)
- 3. Parking Problems (26)
- 4. Security Problems (Records, payments, etc.)
- 5. Shared Space with Non-Court Related Facilities (62)

Condition of Superior and Probate Courts

Good	25%
Fair	50%
Poor	25%

Condition of District Courts

Good	45%
Fair	37%
Poor	18%

The General Court will note that "most District Court houses built since 1970 have no provisions whatsoever for jury facilities."

Hailed among "Notably Good" are the court facilities in Barnstable, Orleans, Brockton, Dudley, Uxbridge, Westboro, Lynn, Woburn, Concord, Roxbury, Fall River. Listed as in "Poor Condition" are Brighton, Chelsea, Dorchester, Edgartown, Fall River Superior, Fitchburg Superior, Holyoke, Ipswich, Middleboro, Plymouth, Salem, Taunton Superior, Williamstown and Winchendon.

The report cites the new District Court in Gloucester as an example of insufficient planning. Built in 1973, it had to be re-wired for window air conditioners since no air conditioning was provided. There was "no interaction among the court or the community" in the design of this facility says the report. It is a "poorly functioning, badly planned facility."¹ Chelsea and Winchendon District Courts should be re-located in other buildings. Both are fire hazards.

Although any standard design for a court house would be undesirable and stultifying, there must be an end to wasteful and inefficient interior planning.

The following should be objectives for future court facilities:

1. Establishment of Uniform Design Standards for Court Facilities.
2. Required consultation with court administrators before authorization of new or renovated facilities.
3. Establishment of standard policy for:
 - a. Maintenance
 - b. Lighting

¹Among other things, it lacked a judges' lobby; it had no consultation rooms for counsel; no jury room; a 110 volt electrical system; no air conditioning; and inadequate parking.

- c. Acoustics
- d. Record Storage
- e. Fire Protection
- f. Security

It ought to be obvious that we can not afford to allow public funds (whether city, county, or state) to be improvidently expended for facilities which are poorly designed for present needs and which can not be adapted to the needs of the future.

The summary report demonstrates the existence of Jury Facilities in District Courts as follows:

	6 Man	12 Man	Jury Room
1. Ayer	1	0	1
2. Barnstable	2	0	2
3. Brockton	2	0	2
4. Cambridge	Yes	Yes	Yes
5. Clinton	2	0	0
6. Concord	1	0	2
7. Dedham	2	0	1
8. Framingham	2	0	3
9. Gloucester	1	0	0
10. Haverhill	—	1	2
11. Lowell	1	0	2
12. Marlboro	2	0	2
13. Pittsfield	0	1	1
14. Somerville	0	1	1
15. Worcester Cent.	Yes	Yes	Yes
16. Boston Municipal Court	Yes	Yes	Yes
17. Boston Housing Court	Yes	Yes	Yes

Thirty-five Percent of the District Courts can offer adequate facilities for a six man jury trial and only 17% have a proper deliberation room. Rest rooms for the jurors must be provided.

If a district or municipal court such as the Boston Municipal Court or the Third District Court of Eastern Middlesex can share jury pools and jury facilities with the Superior Court, the capacity (or future capacity) for such courts to handle jury trials is a significant potential. The provision for reasonable and appropriate jury facilities elsewhere is going to prove costly to the taxpayers.

The Superior Court Scene

Superior Court Trends in Criminal Business

In the report of the Executive Secretary of the Supreme Judicial Court for the fiscal year ending 6/30/75, there are significant indicators which should be made known to the General Court.

Indictments

A. Criminal Indictments Pending 7/1/74	21,596	
B. New Indictments Entered	17,330	
C. Total of Indictments	38,926	
D. Disposed of by Trial		2,896
E. Disposed of Otherwise*		16,197
		19,093
F. Indictments Pending 7/1/75	19,833	
(Involving 10,320 defendants)		

District and Municipal Court Appeals

G. Appeals Pending July 1, 1974	15,912	
H. New Appeals Entered	17,654	
I. Total Appeals	33,566	
J. Disposed of by Trial		1,912
K. Disposed of Otherwise		12,554
		14,466
L. Appeals Pending July 1, 1975	19,100	
(Involving 11, 292 defendants)		

Judicial Deployment on Criminal Cases

Court Days

Superior Court Judges	4,557
District Court Judges Sitting in Superior Court	941
Total	5,498

Assuming a judge could sit five days a week, with a thirty day vacation, eight weeks on non-jury matters, and with the usual public holidays, (or 181 days a year) these statistics indicate that criminal business required the full time service of 30 judges in the Superior Court during the fiscal year or about 65% of the 46 jus-

*Presumably most of these dispositions were made after a plea of guilty was entered in the Superior Court.

tices. An allowance should be made for sick days, judicial education, conference days, weather, and other variables with the probable result that the full time service of possibly 33 judges¹ in the Superior Court was required merely to reduce the backlog of indictments by 1,763 cases while the de novo appeals backlog increased by 3,188 cases. The effect of all this on pending civil cases is devastating for the parties involved.

Superior Court Trends in Civil Business

A. Civil Jury Cases Pending July 1, 1974	52,530
B. Civil Jury Cases Entered	16,963
C. Jury Cases in Progress	69,493
D. Jury Cases Disposed of	17,545
E. Jury Cases Pending July 1, 1975	51,948
F. Civil Non-Jury Cases Pending July 1, 1974	36,709
G. Civil Non-Jury Cases Entered	15,284
H. Non-Jury Cases in Progress	51,993
I. Non-Jury Cases Disposed of	10,013
J. Non-Jury Cases Pending July 1, 1975	41,980

Judicial Deployment on Civil Cases

	Court days
Superior Court Judges	4186
District Court Judges in Superior Court	518
Total	4704

Even assuming a judge could sit on civil cases 230 days a year (5 days a week = 260 less 30 days vacation = 230) the full time service of 20.4 judges would be needed for 4704 court days. Allowing for sickness and other factors, a conservative estimate of 22 full service judges was needed to stay current with a backlog of about 52,000 jury cases while falling behind on the non-jury cases by over 5000. The time of only 13 Superior Court judges was available due to the criminal calendar.

Judicial Deployment in Superior Court

Based on the most recent statistics, the following conclusion can be reached as to the Superior Court:

¹This estimate is conjectural, but we think it is a conservative one.

	Judges Available	Judges Needed
Full Time Service on Criminal Cases	30	33
Full Time Service on Civil Cases	15	22
Chief Justice	1	1
Total Judges deployed merely to stabilize (unsuccessfully) the backlog	46	56

The result is stagnation. At least one of the solutions is more judges. It has been suggested that the present judges might handle more case. It is not possible for us to draw conclusions as to production. In any event, the quantity of judicial business done is no guarantee as to the quality of justice.

We can not detect a change in the attitude of the public which would justify any conclusion that the Superior Court is not the place where justice is sought in the more serious cases, civil and criminal. This conviction in the eyes of the citizens has not changed, and it may never change. It is the core of our judicial system. Expediency and budgetary considerations must be weighed against the feelings of the people of the Commonwealth.

DISTRICT COURT TRENDS 1955 TO 1975¹

<i>Civil Business</i>	1955	1975	20 year change
1. Civil Cases entered	63,798	74,015	+10,217
2. Civil Trials Held	8,732	8,401	-331
3. Percentage of Cases Tried	13.7%	11.4%	-2.3%
4. Eviction Cases Entered	8,072	14,562	+6,490
5. Eviction Cases Tried	3,578	4,537	+959
6. Percentage of Evictions Tried	44.3%	31.2%	-13.1%
7. Cases Removed to Superior Court	9,248	4,537	-4,711
8. Small Claims Filed	70,877	111,036	+40,159
9. Decisions Reviewed by Appellate Division	92	192	+100
10. Decisions Appealed to Supreme Judicial Court	11	9	-2

¹These figures do not include the Boston Municipal Court, but they are illustrative of the problem there.

			20 year change
<i>Criminal Business</i>	<i>1955</i>	<i>1975</i>	
11. Criminal Cases Entered including “Pay By Mail”*	202,126	613,753	+411,627
12. Criminal Cases Appealed to Superior Court ¹	4,057	16,487	+12,430
13. Percentage of Cases Appealed	2%	2.68%*	
14. Auto Violations Except Parking	103,374	440,105	+336,731
15. Auto Violations Percentage	51%	71%	+20%
16. All Juvenile Proceedings	6,934	36,664	+29,730
17. Drunkenness Cases	52,917	NON-CRIMINAL	
*see below			

CASES HANDLED BY A JUDGE — THE SIGNIFICANT 8% APPEAL RATE

Although the number of criminal entries in district courts for the last fiscal year was indeed a total of 613,753, the truly significant cases are in these categories which are handled by a judge.

a. General Criminal Complaints	157,291
b. Narcotics cases	15,253
c. Gaming or Lottery	1,104
d. Operating Under the Influence of Liquor	16,290
e. Operating Under the Influence of Drugs	286
f. Operating to Endanger	13,034
g. Use without Authority and Larceny of motor vehicle	5,304
TOTAL	208,562

The balance of the criminal cases (405,191) include all the auto violations which, under GL Ch. 90C Sec. 4A, can be disposed of by the Clerk of Court or the clerical staff. The problem area seems to be in the above 208,562 figure.¹

¹In many cases more than one complaint is issued as the result of one incident. There are many variables in these figures but we seek trends and significant indicators.

As 16,487 of these 208,562 cases were appealed to the Superior Court for a de novo trial, we find that the rate of appeal is much higher at 7.90% based on the 208,562 figure while *appearing* to be only 2.68% if the misleading 613,753 total is used as the measuring base.

These profiles tell much about our district courts, but a study of the whole picture requires a detailed examination of all the statistical indicators published by the Executive Secretary of the Supreme Judicial Court.¹ Among other things, the district courts collected \$2,219,728 from parking "tickets," and \$11,136,634 in family neglect and nonsupport cases.

Other Recent Trends

Analysis by Kathy O'Connor of the Office of the Executive Secretary of the Supreme Judicial Court indicates we must take steps to cope with the sharp rise in some automobile offenses.

NEGLIGENTLY OPERATING SO AS TO ENDANGER

<i>YEAR</i>	<i>NUMBER of Cases</i>
1971	8,336
1972	9,963
1973	10,980
1974	12,230
1975	13,034

This is a 63.9% increase in five years.

Operating Under the Influence

1971	9,105
1972	10,675
1973	12,861
1974	14,583
1975	16,290

Here we have a 55.9% increase in five years

Drug cases seem to be stabilized at about 15,000 per year, down from 24,000 in 1971 when the Marijuhana epidemic was at its height.

The advent of "No Fault" did much to reduce the number of civil cases entered in the district courts. The fact that only 11 to

¹Superior Court figures show 17,654 cases but these include Boston Municipal Court, etc.

13% of the civil cases are tried is a normal indicator of the system. The General Court can recognize certain trends from these statistics. The increase in eviction cases (55.4%) denotes that a far greater number of people have elected to live in rental housing or have been forced into such accommodations. The revolution in Landlord-Tenant law will continue to spur on many more Summary Process actions (Evictions). Small claims have increased by 64% in the past twenty years due in part to the increased limit of such claims.

Very few of the decisions of the district court judges are appealed in civil cases.

Criminal Business

These indicators show that the criminal business of the district courts has increased over 300% by 411,627 cases since 1955.

What is of vital interest is the true percentage of appeals in criminal cases from the district court to the Superior Court for a trial *de novo* or *other disposition*.

Appeals to Superior Court

1955	4,057
1971	15,966
1972	17,342
1973	15,867
1974	14,999
1975	16,487

Less Than 8% Appealed

About 8% of the 208,562 "Judge handled"¹ criminal cases entered in the district courts seem to have been appealed to the Superior Court. In such appeals (16,487) a jury trial was claimed or the sentence was challenged. As there were only 1,912 *de novo* criminal trials in the Superior Court during this period, it may safely be assumed that the purpose of most such appeals may not actually be to have a trial by jury but to get the defendants a better disposition.

It may also be noted that auto violations account for 71% of the total criminal business of the district courts. The General Court may wish to explore this fact of our jurisprudence.

¹Large volumes of motor vehicle (non parking) complaints are handled by the clerks and the fine is paid by mail. The total number of criminal entries was 613,753.

We can expect and should provide for a substantial increase in juvenile proceedings including those conducted for "Children In Need of Services." Our life styles can not proceed too far along currently indicated paths without the need for a system to protect the young victims of a flight from parental responsibility and the kind of care and attention that was once traditional in the nuclear family.

The Use of Temporary Expedients

We anticipate that the present deplorable state of the judicial system may evoke a number of suggestions for "crash" programs to deliver judicial services.

Magistrates, for example, could deal with criminal matters of a run of the mill variety where the penalty was not likely to be severe and where no trial was desired by the defendant. There will be no end of suggestions for easy solutions.

We confine our comments to the permanent and enduring changes which the judicial system requires. The system, with all its faults, is among the best; and justice is done albeit after a long delay. The twenty year trend we observe ought to dispel the fallacy that temporary expedients will cure all our judicial ills.

While we do not discourage "crash" programs, we can not accept them as permanent progress.

The General Court has exercised its exclusive constitutional authority to "constitute judicatories" in a progressive and responsible manner in the past few years. Much has been done. We hope the patience and prudence already demonstrated will continue to bring about more legislative accomplishments for the permanent improvement of the courts.

Proposals for 1976

Included among the proposals for 1976 are such things as the reference of civil actions pending in the probate court to Masters as a measure to reduce congestion.¹ Greater use of District Court judges in the Superior Court to reduce congestion is also proposed.² A specific proposal aimed at reducing Superior Court congestion is to increase from \$4,000 to \$10,000 the level at which the case must go either to the District or Superior Court. Under the provision of Ch. 231 § 102C, cases in which it is likely that

¹Senate 638

²Senate 636

less than \$4,000 will be awarded as damages must first be tried in the district or municipal court. It is suggested that this figure be raised to \$10,000.¹ In order to expeditiously dispose of smaller cases, it is also suggested that the limit on small claims be raised from \$400 to \$750.²

We do not see that it is realistic to suppose that a judge could sit during the day and then appear for a night session. It would also be a mistake to assume that a night session could be held without considerable cost which would include compensation for the clerk, court officer, janitorial services, energy, and miscellaneous costs involved with holding the session. Such a proposal would not really be an economy and might result in judicial attrition without real benefit.

We also should mention that night sessions involve additional problems of building security, heating, and the reluctance of witnesses, particularly women, to travel into the city or congested areas at night. We support the concept of recording the proceedings in the Probate and District Courts.³

(H) JUDICIAL ADMINISTRATION

Some will argue to the General Court that the salvation of our judicial system lies in the establishment of a centralized administration for the entire judicial branch. Central to this philosophy is the concept that the Chief Justice of the Supreme Judicial Court would be the chief administrator of the judicial branch acting, in all probability, through the office of the Executive Secretary.

THE OFFICE OF THE EXECUTIVE SECRETARY

Administrative Office of the Judicial System

The office of the Executive Secretary was created in 1956. At the present time the office consists of the following permanent positions:

- a) An Executive Secretary
- b) 3 assistant Executive Secretaries who are members of the bar
- c) 3 secretaries.

¹Senate 638

²Senate 636

³Senate 649, House 320, and House 321.

At the present time, the executive secretary is working with federal funds on the following projects:

- 1) Court house facilities study.
- 2) Task force to update the Massachusetts reports.
- 3) Massachusetts Court Management Survey
- 4) Data Processing Project
- 5) Criminal Rules Project
- 6) Grant Management Program
- 7) Public Information Office

The Functions of the Executive Secretary

The office of the Executive Secretary carries on many activities. Consistent with the statutory mandate creating the office, the Executive Secretary is performing the following tasks;

1) The Executive Secretary prepares and presents an Annual report to the Supreme Judicial Court containing statistical data on the court system and the workload of the courts and judges.

2) The Executive Secretary sits as the secretary to the Judicial Conference and to the Committee on Complaints.

3) The Office of the Executive Secretary receives complaints concerning judges and lawyers. The Executive Secretary was greatly burdened with this, and the practice now is to refer all complaints to the Board of Bar Overseers.

4) Under a federal grant, the Executive Secretary coordinates a continuing education program for judges and judicial personnel;

5) The Executive Secretary is presently attempting to coordinate various projects to provide adequate courtroom facilities. The services of a recognized expert in courtroom space management have been retained.

6) The Executive Secretary coordinates and prepares court applications for grants.

7) The Executive Secretary coordinates the data processing activities in the judicial system. At the present time, the following are the specific projects involving the data processing center;

- a) automated system of processing parking violations;
- b) development of Superior Court case management system;
- c) Massachusetts participation in a Multi-State informational system.

The Executive Secretary has received federal grants for the implementation of the Superior Court case Management system. Other plans for the data processing system include;

- a) monitoring cases during the appellate process;

- b) juror management;
- c) automation of probate procedure;
- d) automated collection of support payments;
- 8) An Assistant Executive Secretary is presently working on the management of records and their storage;
- 9) The Executive Secretary is also responsible for the budgetary and fiscal affairs of the Supreme Judicial Court as well as the personnel administration of his own office, and to some extent that of the Supreme Judicial Court. He is responsible for the state payroll of the Supreme Judicial Court.
- 10) One Assistant Executive Secretary serves as an Administrative Assistant to the Chief Justice of the Supreme Judicial Court;
- 11) The Executive Secretary publishes the *Docket*, a public information newsletter on the courts.
- 12) The Executive Secretary's office conducts a statistical analysis of the workloads and budgets of all the Massachusetts courts;
- 13) The Executive Secretary oversees the use by judges of the inherent power to incur expenses reasonably necessary for the operation of the judicial system;

On review of the activities of the Executive Secretary, it appears that the office is in need of dramatic change. The need for an Executive Secretary or Administrator is obvious. As presently constituted, the office is understaffed and underequipped. It is possible that the Executive Secretary's office has overextended the few resources it has.

Despite the progress, the Executive Secretary is still not yet an efficient administrative arm of the Supreme Judicial Court. Thirty-six other jurisdictions have executive secretaries who have larger staffs than in Massachusetts. New Jersey has a staff of 89 and Connecticut has 40. Massachusetts ranks fifth in New England in state court administration.

While the permanent complement in the Executive Secretary's office has remained small, the administrative offices at the trial level have expanded. The Administrative offices at the Superior and District Courts exceed those of the Executive Secretary which illustrates an ad hoc, piecemeal approach to the administration of the Massachusetts Court system.

The Office of the Executive Secretary is expected to contend for support with administrative offices at a lower level. This sort of fragmentation of the court system adds another impediment to the creation of an effective and centralized system of court administration.

It will not be possible to rely indefinitely on federal funding to accomplish the job. LEAA funds for 1976 are less than those granted in 1975. What is needed is a legislative commitment to the office of the Executive Secretary.

The Executive Secretary's Function

Former Chief Justice Tauro saw the Executive Secretary as responsible in these areas:

- 1) Personnel management;
- 2) Financial management;
- 3) Calendar management;
- 4) Jury management;
- 5) Courtroom facilities management;
- 6) Public information services;
- 7) Liaison service with other government branches;
- 8) Liaison services with bar associations, and law schools;
- 9) House counsel on administrative matters;
- 10) Research and planning.

With the exception of items 3 & 4, the Executive Secretary attempts, at the present time to perform all of these services. While qualitatively, the office of the Executive Secretary surpasses similar offices in many states, quantitatively that office lags behind many. Not only is additional state funding needed, but also there is a great need for the adoption of a standard set of operating procedures.

Objectives for the Future

At the present time, the Executive Secretary is trying to determine priorities in his office. He is attempting to determine which functions are critical and which can be performed by another office. He is also trying to organize his staff so that they can best effectuate those priorities. He is currently pursuing those projects which are urgently needed, e.g., data processing center. The administrative staff of the Supreme Judicial Court consists of 12 separate offices. Several offices perform functions which overlap. The Executive Secretary should coordinate all of these offices so

that duplication of work is avoided. The ultimate long range goal of the office of Executive Secretary is to become an efficient administrative operation. In this context, the Executive Secretary should prepare and submit a detailed plan for centralized court management. Chief Justice Tauro equated or analogized the Executive Secretary's objectives to those of a Hospital administrator. The latter's job is to superintend the operation of the day to day activities of the hospital so that the physicians can continue to carry on the job of doctoring. A similar reasoning applies to judges and the judicial system.

It is proposed by Senate 654 of 1976 to change the name of the office of Executive Secretary to the Administrative Offices of the Massachusetts Courts. The change of name is not merely a change in form alone. The substance of the bill (Senate 654 of 1976) makes it clear that it is a foundation for a strong administrative office which will be responsible not only to the Supreme Judicial Court but also to the legislature.

(I) COURT UNIFICATION

We discussed the philosophy of "Unification" in our 50th Report for 1974.¹ The term "unification" has come to describe a single state-wide body of judges who can serve in any trial court and can be deployed to meet the changing needs of the judicial system. We now have 269 judges, 6000 support personnel, 112 buildings and a budget of more than \$80 million a year.

The General Court and the average citizen of the commonwealth must first become convinced that one single trial court would be more efficient and result in better administration of justice than the several courts we now have. This has yet to be demonstrated.

Our present judicial system of 97 courts is substantially the format which was created under the Charter of 1691 and much of it can be traced to Pilgrim times. The District Courts have never been and are not now "state" courts. They are community based and financed with local real estate taxes; they are part of the county apparatus. In the recent past, the progress in operating the District Courts under uniform rules, and with uniform administrative procedures has been noteworthy. With the elimination of part-time judges, the strength and effectiveness of the District

¹Pps. 42-48

Court bench will be more and more apparent. Many judges of our District Courts are now deployed to the Courts where the need is greatest. By the time of final phase out of the special justice in 1979 — the capabilities in this area will be greatly enhanced.¹

To a large extent then, the “Unification” of the District Courts is well underway. More “unification” of the Probate Courts, which are county tribunals, is clearly the ultimate objective. Productive efforts are now well underway to standardize probate procedure, practice, and administrative operation. Interchange of probate judges between courts is a customary practice. Assignment of Probate and District Court judges across county lines may still remain a problem area.

The Superior Court, also a county, rather than a State, institution even from early colonial times, is “unified” in the sense that each justice of this collegiate tribunal is eligible for duty in every session in every county.

Some District Court judges are certified to sit in the Superior Court to expedite the trial and disposition of the case load. Because of the avalanche of criminal business, the Superior Court can not cope with the five year back log of civil cases and the mountain of criminal cases which now wait decision.

After the 1691 Charter, the Superior Court of Judicature (now called the Supreme Judicial Court) became the first truly state-wide court. We have added a Court of Appeal and the Land Court both of which serve the entire state.

Our juvenile courts and the Housing Courts in Boston and Springfield serve a special need and may properly be regarded as specialized courts but their independent status for administrative purposes can only be regarded as fragmentation.

True “Unification” would combine all the trial courts into one single system. Specialization such as now exists in the Land Court or Probate Courts might still be present.

The Great Debate

Should we continue to ask the General Court to support the separate improvement of each class of our trial courts, District,

¹Sec. 6A of Ch. 862 of 1975 permits assignment of the former special justices to courts which are reasonably near to the court to which they were appointed, and in “exigent circumstances” to any district court.

Probate, Superior, Land Court, and Housing Courts, or should we combine or unify all the trial courts into a single system?

There is more reason in other jurisdictions to talk about unification than there is in Massachusetts. There is no magic in the unification of the district court, the probate court, the housing court, the land court, and the superior court. Unification is impossible without a new method of financing, and it is not possible without a drastic revision of the concept of county government unless pursuant to proposals such as Senate 629 of 1976 the entire costs of the courts are shifted to the Commonwealth. There does not seem to be tremendous support for such legislation. Traditionally, the district court has been community based and the superior court, although largely state financed, is still a county institution in the eyes of the public. It must not be forgotten that the regular terms of the superior court in each county are established by legislation. Under G. L. Ch. 212 § 14A, the Chief Justice of the Superior Court may also establish special sittings.

(J) The Circuit Judge of Probate Concept

By Chapter 862, Sec. 1, of the Acts of 1975¹, a circuit judge of probate has been provided for. This full-time probate judge may be assigned to any county by the Chief Judge of Probate.

Other Probate Court Proposals

It will be proposed to this session of the General Court that the name of the probate court be changed to "Probate and Family Court." The continual use of the term "insolvency" in connection with the probate court is as archaic as the stagecoach. The probate court is truly a family court and might well be so designated. (Senate 644 of 1976)

¹Amedning G.L. Ch. 217, Sec. 3.

II. CRIMINAL LAW AND PRACTICE

- A. Speedy Trial of Criminal Defendants.
- B. The Right Of Privacy And The Right To A Public Trial — The Rape Victim And The Criminal Justice System.
- C. Evidence — Accident Report Inadmissible Against Maker.
- D. Misdemeanors — Issuance of Citations By Police Officers.
- E. Reorganizing The System Of Probation In The Commonwealth.
- F. Penalties For Obstruction Of Justice.

(A) SPEEDY TRIAL OF CRIMINAL DEFENDANTS

HOUSE (1975) No. 2299

AN ACT PROVIDING FOR THE SPEEDY TRIAL OF CRIMINAL DEFENDANTS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

- 1 A bill to repeal section 72 of chapter 277 of the Gen-
- 2 eral Laws, as recently amended by section 61 of chapter
- 3 218 of the Revised Laws, and inserting in place thereof:
- 4 1) The trial of criminal cases shall be given preference
- 5 over civil cases. The trial of defendants in custody and
- 6 defendants whose pre-trial liberty is reasonably believed
- 7 to present unusual risks should be given preference over
- 8 other criminal cases.
- 9 a) In cases where a defendant is detained, the Com-
- 10 monwealth must be ready for trial within 90 days from
- 11 the date of detention. If the Commonwealth is not ready
- 12 for trial within such time, the defendant shall be re-
- 13 leased upon bond or his own recognizance or upon such
- 14 other conditions as the court may determine unless
- 15 there is a showing of exceptional circumstances by the
- 16 Commonwealth justifying the continued detention of the
- 17 defendant, and then the detention shall continue only for
- 18 as long as necessary. This shall not apply to any defen-
- 19 dant who is serving a term of imprisonment for another
- 20 offense, nor to any defendant who, subsequent to re-
- 21 lease under this rule, has been charged with another
- 22 crime or has violated the conditions of his release.

b) In all cases, the Commonwealth must be ready for trial within six months from the date of arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment) whichever is the earliest. If the Commonwealth is not ready for trial within such time, or within the period extended by the court for good cause, then, upon application of the defendant or upon motion of the court, after an opportunity for argument, the charge shall be dismissed.

2) Specified periods of time excluded from the above computations are:

a) A reasonable period of delay resulting from other proceedings concerning the defendant, including but not limited to proceedings for the determination of competency and the period during which he is incompetent to stand trial, pre-trial motions, interlocutory appeals, trial of other charges, and the period during which such matters are subjudice.

b) The period of delay resulting from a continuance granted by the court at the request of, or with the consent of, the defendant or his counsel. The court shall grant such a continuance only if it is satisfied the postponement is in the interest of justice, taking into account the public interest in the prompt disposition of criminal charges. A defendant without counsel should not be deemed to have consented to a continuance unless he has been advised by the court of his rights under these rules and the effect of his consent.

c) The period of delay resulting from a continuance granted at the request of a prosecuting attorney if:

i. the continuance is granted because of the unavailability of evidence material or witnesses to the government's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available within a reasonable period; or

ii. the continuance is granted to allow the prosecuting attorney additional time to prepare the government's case and the Commonwealth shows this additional time is justified by the exceptional circumstances of the case.

I The Supreme Court's Approach — Barker v. Wingo, 407 U.S. 514 (1972).

The Supreme Court's most in depth discussion of the Sixth Amendment right to a speedy trial occurred in *Barker v. Wingo*,

407 U.S. 514 (1972). In *Barker*, the defendant was convicted of murder after a delay of five years from the date of his arrest to the date of trial. The Supreme Court was asked to set a specific time period within which a criminal defendant must be brought to trial; however, the court in *Barker* rejected this request stating that:

We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months.

While the Supreme Court refused to set specific time periods, it did not prohibit the states from enacting such time periods.

In attempting to provide lower federal and state courts with some guidance on the adjudication of speedy trial claims, the Supreme Court listed four factors to be considered. First, the length of the delay was viewed as a "triggering mechanism." Unless there is a delay which is presumptively prejudicial, a court need not investigate any other factors relevant to a speedy trial claim. Obviously, what constitutes a presumptively prejudicial delay is a matter to be decided on the basis of the facts of each case. Secondly, the reasons for the delay should be considered. If the delay was an intentional attempt to harass or hinder the defendant, this should be given great weight. On the other hand, a delay due to the prosecutor's negligence or due to court congestion, while significant, should be weighed less heavily. Thirdly, whether the defendant has asserted his right to a speedy trial is also an element which was listed by the Supreme Court in *Barker* as bearing on whether a defendant's Sixth Amendment rights have been violated. A defendant's failure to assert his rights is merely a factor to be considered and should not be construed as a waiver of his Sixth Amendment rights. The idea that a defendant waives his constitutional right to a speedy trial by his failure to assert it was expressly rejected by the *Barker* court. Finally, whether the defendant has been prejudiced by the delay is an important factor, as will be seen by an analysis of the first circuit cases dealing with speedy trial claims.

The Supreme Court in *Barker* acknowledged that a five-year delay was extraordinary. Nevertheless, the court found that the defendant had not been deprived of his right to a speedy trial since he was not seriously prejudiced by the delay, nor did he make any objection to the delay until after three years had passed.

II The First Circuit's Approach after *Barker v. Wingo*

The decision in *Barker v. Wingo* has been closely followed by the Court of Appeals for the First Circuit. In *United States v. Cabral*, 475 F. 2d 715 (1st Cir. 1973), there was a fifteen month delay between the arrest of the defendant and the return of an indictment. Moreover, after the indictment, there was an eight-month delay until trial. The court in *Cabral* held that the defendant's failure to demand a speedy trial after the indictment weighed heavily against him; and the court therefore limited its discussion of the speedy trial claim to the fifteen-month pre-indictment delay. The court found no intent to stall or delay on the part of the government; however, the disposition of the case turned on the defendant's failure to allege and prove that he suffered prejudice as a result of the delay. While the court in *Cabral* was disturbed by the length of the delay, it held that the defendant must show "actual" prejudice. 475 F. 2d at 720.

United States v. Churchill, 483 F. 2d 268 (1st Cir. 1973), involved a 26-month post-indictment delay. Once again, the first circuit found the absence of a specific showing of prejudice to be very significant. The defendant in *Churchill* merely alleged that the trial transcript showed several instances of prejudice. The court was unimpressed with this assertion and stated that it "... cannot simply assume that the defendant was prejudiced" While the court in *Churchill* rejected the defendant's speedy trial claim, it is noteworthy that the court acknowledged that a twenty-six month delay was "inordinate."

The history of the first circuit has been to require a defendant to make a clear showing of prejudice resulting from a delay. The difficulty of obtaining a dismissal based on a speedy trial claim is illustrated by the long series of cases heard by the first circuit in which the claim has been rejected. See: *United States v. Churchill*, 483 F. 2d 268 (1st Cir. 1973); *United States v. Cabral*, 475 F. 2d 715 (1st Cir. 1973); *United States v. Daley*, 454 F. 2d 505 (1st Cir. 1972); *United States v. Butler*, 426 F. 2d 1275 (1st Cir. 1970); *United States v. Deleo*, 422 F. 2d 487 (1st Cir. 1970); *Carroll v. United States*, 392 F. 2d 185 (1st Cir. 1968); *Flemming v. United States*, 378 F. 2d 502 (1st Cir. 1967).

The first circuit finally dismissed a charge against a defendant based upon a claim of the denial of a speedy trial in *United States v. Fay*, 505 F. 2d 1037 (1st Cir. 1974). In *Fay*, the defendant was indicted in February of 1973 for selling narcotics. It was not until

June of 1974 that he finally stood trial. The defendant alleged and proved to the satisfaction of the court in *Fay* that a critical defense witness disappeared during the delay. While it was also established that the defendant had made a minimal effort to keep in contact with this witness, the court held that the defendant was sufficiently prejudiced by the delay to warrant dismissal of the charges against him. It is clear from *Fay* that the specific claim of prejudice on the part of the defendant was a critical element in the court's decision.

Several commentators have vigorously criticized the requirement that the defendant must show prejudice. Note, *The Right To A Speedy Trial*, 20 Stan. L. Rev. 476, 497-500 (1968); Note, *Constitutional Right To A Speedy Trial: The Element of Prejudice and the Burden of Proof*, 44 Temp. L.Q. 310, 315-16 (1971); Note, *The Lagging Right To A Speedy Trial* 51 L.Va. L. Rev. 1587, 1591-97 (1965). The rationale for this criticism has been that it is basically unfair to require the defendant to bear the burden of proving a denial of a constitutional right where there has been a sufficiently long delay in reaching trial. These commentators suggest that the burden should be on the government to prove that the defendant has suffered no prejudice as a result of a delay not caused by the defendant himself.

III The Speedy Trial Act of 1974, 18 U.S.C.A., §3161 et. seq.

The Speedy Trial Act of 1974, provides for specific time periods within which a criminal defendant, charged with a federal offense, must be indicted, arraigned, and tried. The act provides for a three-year phase-in period commencing July 1, 1976. Beginning July 1, 1976, the following time limits must be observed:

A	Arrest or service of summons to indictment.....	60 Days
B	Indictment to arraignment.....	10 Days
C	Arraignment to trial.....	180 Days
	Total	250 Days

Beginning July 1, 1977, the following time limits will become effective:

A	Arrest or service of summons to indictment.....	45 Days
B	Indictment to arraignment.....	10 Days
C	Arraignment to trial.....	120 Days
	Total	175 Days

Beginning July 1, 1978, the following time limits will be observed:

A	Arrest or service of summons to indictment	35 Days
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B	Indictment to arraignment	10 Days
C	Arraignment to trial.....	80 Days
	Total	125 Days

Finally, on July 1, 1979, the following time limits will become effective:

A	Arrest or service of summons to indictment	30 Days
B	Indictment to arraignment.....	10 Days
C	Arraignment to trial	60 Days
	Total	100 Days

18 U.S.C.A., §3161 (h) also provides for time extensions where the defendant has caused the time period to be exceeded or where the ends of justice so require. The act also sets out the sanctions to be imposed upon the government when a criminal defendant is not brought to trial within the statutory time period. 18 U.S.C.A., §3162 provides that the charges against the defendant shall be dismissed if the time periods are exceeded. While dismissal of the charges is the only remedy provided for in the act, it is not automatic. The defendant must make a motion requesting the dismissal. If he does not do so, his failure will be viewed as a waiver of his rights to a dismissal. The government shall have the burden of going forward with the evidence with respect to any time extension claimed. The dismissal may be granted with prejudice (preventing reprosecution) or without prejudice (allowing reprosecution).

The sanctions contained in §3162 do not take effect until July 1, 1979. Under what circumstances a court may grant a dismissal without prejudice (allowing reprosecution) is not mentioned in the statute. However, the legislative history provides some guidance. The Committee report on the speedy trial act indicates that reprosecution after dismissal should be allowed only in "exceptional circumstances." Thus, the burden is on the government to show that reprosecution should be allowed, 4 U.S. Cong. & Adm. News at 7429-30 (1974).

The Speedy Trial Act of 1974 is in complete accord with the American Bar Association's Standards relating to speedy trial. In fact, the legislative history indicates that the ABA's standards were the basis of the speedy trial act. The ABA standards do not specify time periods in terms of days or months, but they do recommend that the speedy trial right should be quantified in terms of fixed time periods. The ABA standards also recommend that

dismissal of the charges against the defendant is the only remedy for the violation of the right to speedy trial; however, the standards do not leave open any possibility of reprosecution.

Part IV, §4.1 of the standards provides:

If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, the consequence should be absolute discharge. Such discharge should forever bar prosecution for the offense charged and for any other offense required to be joined with that offense.

ABA Standards Relating To Speedy Trial, P.9 (Approved Draft, 1968).

The legislative history of the speedy trial act strongly indicates that the likelihood of many cases being reprosecuted after a dismissal is small. See: 4 U.S. Cong. & Adm. News at 7430.

IV A Plan for Achieving Prompt Disposition of Criminal Cases in the United States District Court for the District of Massachusetts

Pursuant to Rule 50 (b) of the Federal Rules of Criminal Procedure, the United States District Court for the District of Massachusetts adopted standards relating to the speedy disposition of criminal cases. The district rules became effective on October 1, 1972. The rules actually provided different standards for those defendants in custody and those who have been released from custody. The following time limits will be observed by district court judges where the defendant is in custody:

- A) After indictment the defendant must be arraigned within twenty days;
- B) Trial must commence within 90 days after a plea of not guilty is entered.

Where the defendant has been released from custody the time periods are lengthened:

- A) The defendant must be arraigned within 30 days after indictment;
- B) Trial must commence 180 days after a plea of not guilty.

Time extensions are permitted where the defendant has contributed to the time periods being exceeded. Moreover, continuances will be granted for "persuasive reasons."

The sanctions imposed upon the government for non-compliance with the rules appear to be less stringent than those provided for in the Speedy Trial Act of 1974. If the time periods

are exceeded, the defendant shall be released from custody. Upon application of the defendant, the charges against him may be dismissed. However, the rules do not specify whether reprosecution will be permitted.

Section 3164 of the Speedy Trial Act provides that, effective July 1, 1975, all of the district courts must set up interim plans for the prompt disposition of criminal cases of detained persons and released persons who are considered to be high risks. The act further provides that effective July 1, 1975, those persons should be brought to trial within 90 days. Failure to comply with this deadline shall result in the release of the defendant, (it should be noted again that until July 1, 1979, dismissal of the charges against a defendant is not mandatory for non-compliance with the provisions of the Speedy Trial Act).

In light of §3164, the district rules must be modified so that released persons who are high risk cases must be brought to trial within 90 days.

V House Bill 2299

House Bill 2299, establishing standards for the speedy trial of criminal defendants, is less extensive than the federal statute. House Bill 2299 provides that those who are in custody or otherwise detained must be brought to trial within 90 days of the date of detention. Failure to comply with this time limit will result in the release of the defendant.

In all cases, the government must be prepared to commence trial within 6 months from the date of the defendant's arrest, service of summons, detention, or the filing of a complaint. If the Commonwealth is not prepared within the 6 month time frame, the charge against the defendant shall be dismissed. However, House 2299 does not specify whether reprosecution of the defendant will be allowed after a dismissal.

The time periods contained in 2299 are obviously much longer than the final provisions of the speedy trial act. The basic change that this bill would make in Chapter 277, §72 of the General Laws is to provide for possible dismissal after the expiration of the 6 month period. At the present time, Massachusetts only requires that a criminal defendant be released from custody if he has not been tried within 6 months.

VI Recommendations Of The Judicial Council

We do not recommend this bill.

While a person’s Sixth Amendment right to a speedy trial is of fundamental importance, we do not favor the approach adopted by the Speedy Trial Act of 1974 or proposed by H.2299. It is very often desirable for a criminal defendant not to go to trial without a period of time for preparation. Moreover, it is likely that the prosecution has taken a year or more to develop its case prior to the indictment or arrest, and theoretically the government is prepared for trial sooner than the defendant might be under the circumstances.

Another important consideration is the availability of judicial manpower to properly implement and comply with specific speedy trial time tables. The Judicial Council has consistently recommended the addition of more judges and the use of retired judges to help our overcrowded courts. We cannot, at this time, recommend H. 2299 which would have the effect of further burdening an already congested judicial system.

Finally, the enactment of fixed time periods as proposed by H. 2299 might have the effect of depriving a defendant of the counsel of his choice. Counsel cannot schedule his trials in advance when several clients are required to be tried at approximately the same time. H. 2299 would force cases to trial with any available counsel even if the defendant would prefer to proceed with his own choice of counsel.

A rule of court which effectively protects a defendant’s right is preferable to rigid and inflexible time tables. For these reasons, we oppose H. 2299.

**(B) THE RIGHT OF PRIVACY AND THE RIGHT TO A
PUBLIC TRIAL — THE RAPE VICTIM AND
THE CRIMINAL JUSTICE SYSTEM**

HOUSE (1975) No. 614

**AN ACT PROVIDING FOR THE EXCLUSION OF THE
PUBLIC FROM THE TRIAL OF CERTAIN SEX OF-
FENSES.**

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

- 1 Chapter 278 of the General Laws is hereby amended
- 2 by striking out section 16A, as appearing in the Ter-
- 3 centenary Edition, and inserting in place thereof the fol-
- 4 lowing section : —
- 5 *Section 16A.* At the trial of a complaint or indictment
- 6 for rape, incest, carnal abuse or other crime involving
- 7 sex, or at the trial of a complaint or indictment for get-
- 8 ting a woman with child out of wedlock, or for the non-
- 9 support of an illegitimate child, the presiding justice
- 10 shall exclude the general public from the court room,
- 11 admitting only such persons as may have a direct in-
- 12 terest in the case.

HOUSE (1975) No. 1710

AN ACT PROVIDING FOR THE EXCLUSION OF GENERAL PUBLIC FROM COURT ROOM DURING TRIAL OF CERTAIN PROCEEDINGS INVOLVING THE CRIME OF RAPE.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

- 1 Chapter 278 of the General Laws is hereby amended
- 2 by inserting after Section 16B the following section:—
- 3 *Section 16C.* At the trial of a complaint or indictment
- 4 for rape, incest, carnal abuse or other crimes involving
- 5 sex, the presiding justice may, at the request of the
- 6 Plaintiff, exclude the general public from the court
- 7 room, admitting only such persons as may have a direct
- 8 interest in the case.

SENATE (1975) No. 901

AN ACT PROTECTING THE RIGHT OF PRIVACY OF RAPE VICTIMS IN COURTROOM PROCEDURES.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

- 1 Chapter 233 of the General Laws is hereby amended

- 2 by inserting after section 23C the following section:—
3 *Section 23D.* Upon a written motion by the prosecution,
4 the judge at his discretion may hear testimony of
5 the complaining witness in closed court.

The Sixth Amendment to the Federal constitution provides that “(i)n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .” The constitutional requirement of a public trial has been modified somewhat by Chapter 278, §16A of the General Laws which provides:

At the trial of a complaint or indictment for rape, incest, carnal abuse, or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, or at the trial of a complaint or indictment for getting a woman with child out of wedlock, or for the non-support of an illegitimate child, the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case.

The change that S. 901, H. 1710, and H. 614 would effect in Chapter 278, §16A is to exclude the public from trials involving crimes of sex in all cases, not merely those involving a person under the age of 18.

The constitutionality of Chapter 278, §16A has been upheld on several occasions. In *Commonwealth v. Blondin*, 324 Mass. 564 (1949), the defendant was indicted and convicted of raping a female child under the age of sixteen. The defendant appealed from his conviction on the ground that he was denied his right to a public trial as guaranteed by the Sixth Amendment of the United States Constitution. The Supreme Judicial Court noted that there is no right to a public trial in the Massachusetts Constitution (Wyoming and Connecticut do not have constitutional provisions granting the right of a public trial either). Nevertheless, the court, while upholding the constitutionality of the statute, stated that it was to be “strictly construed in favor of the general principle of publicity.” Moreover, the court construed the phrase “such persons as may have a direct interest in the case” very broadly. The statute was not to be interpreted as “excluding a parent, husband, wife, or guardian of a defendant or even a friend whose presence he desires and who might give him legitimate assistance or comfort . . .” *Id.* at 571.

That Chapter 278, §16A is to be broadly construed in favor of a

public trial was illustrated in the fairly recent case of *Commonwealth v. Marshall*, 356 Mass. 432 (1969). In *Marshall*, the defendant was convicted of the crime of sodomy with a sixteen year old boy. The prosecution requested and the trial court ordered that the courtroom be cleared of all spectators. The defendant's parents, sisters, and friends were among those excluded from the trial. The court in *Marshall* held that the exclusion of these people was "beyond the authorization of §16A" and was in "violation of the Sixth Amendment to the Constitution of the United States . . ." *Id.* at 434-35. *But see, Commonwealth v. Wells*, 660 Mass. 846 (1971) (defendant must make it known to court which persons he wishes to remain in courtroom.)

Thus, while Chapter 278, §16A has not been held to be unconstitutional on its face, it may contravene the Sixth Amendment right to a public trial as applied. *Accord. Melanson v. O'Brien*, 191 F.2d 963 (1st Cir. 1951) *aff'd* *Melanson v. O'Brien*, 203 F.2d 934 (1st Cir. 1953).

The exclusion of the general public from trials involving crimes of sex where a minor is the complaining witness has been upheld in other jurisdictions as well. *See: United States v. Geise*, 158 158 F. Supp. 821 (D. Alaska 1958); *State v. Holm*, 224 P. 2d. 500, 513 (Wyo. 1950). In addition, several states have statutes excluding the general public from certain trials. Ala. Const. Art. VI, §169 (1901) (public may be excluded from rape trials and assault with intent to ravish cases); Fla. Stat. ch. 29931, §2 (1955) (public excluded from sex crimes cases where person under sixteen testifies). *See generally, Wigmore On Evidence* §1835 (3d. ed. Supp. 1975).

The rationale of all these cases upholding the exclusion of the general public from certain trials is to protect a minor from the embarrassment of testifying about the lurid details of a case. Furthermore, it is quite clear that a defendant's right to a public trial is not unlimited and is subject to reasonable restrictions.

Nevertheless, the question remains whether a state may bar the general public from rape trials where the rationale of protecting a minor is not present.

Statutes in several states provide for the exclusion of the general public from trials involving certain crimes, regardless of the age of the victim. For example, Alabama has a constitutional provision which specifically excludes the public from rape trials

(Ala. Const. art. VI, §169 (1901)). *See also:* New York Judiciary Laws, art. 2, §4 (McKinney's Consol. Laws) which provides that:

The sittings of every court . . . shall be public . . . except that in all proceedings and trials in cases for divorce, seduction, abortion, rape, assault with intent to commit rape, sodomy, bastardy, or filiation, the court may, in its discretion, exclude therefrom . . .

See also: Iowa Stat. ch. 121, §9 (1955) (trials involving sexual psychopaths: public excluded); N.H. Stat. ch. 314, §5 (1949) (public excluded from trials involving sexual psychopaths); Wis. Stat. ch. 631, §44 (1949) (public excluded where defendant is charged with a crime involving immorality or indecency).

It is clear that the interests of both the defendant and the victim must be balanced. No bar against public attendance can be absolute and the defendant's relatives or persons he specifically chooses to have in attendance at trial cannot be constitutionally excluded. The thrust of S. 901, H. 614, and H. 1710 is to exclude those members of the general public who are merely attending the trials out of curiosity.

That a balancing of the defendant's and society's interest must be made was illustrated in *Stamiecarbon, N.V. v. American Cyanimid Co.*, 506 F. 2d 532, 539 (2d. Cir. 1974) where the trial court excluded the public in a criminal contempt proceeding because of the possibility that the complaining witness would suffer irreparable harm by the disclosure of trade secrets. In affirming the trial court's order of exclusion, the court of appeals stated:

On occasions . . . attendance at criminal trials by the general public will be barred even against the wishes of the accused, in order to implement policies whose importance outweighs the danger of a miscarriage of justice which may attend judicial proceedings carried out in even partial secrecy.

See also: *United States v. Bell*, 464 F. 2d 667, 670 (2d Cir.) cert. denied 409 U.S. 991 (1972) (suppression hearing held in camera without defendant or general public because of possibility of disclosing secret procedures used to apprehend skyjackers). *But see:* *United States v. Clark*, 475 F. 2d 240, 246 (2d Cir. 1973) (public can only be excluded from confidential testimony, not all testimony).

The general public may also be excluded from trials where the administration of justice requires it. *See: United States ex rel.*

Bruno v. Herold, 408 F. 2d 125, 127 (2d Cir. 1969) *cert denied* 397 U.S. 957 (1970) (to prevent harassment of witnesses); *United States ex. rel. Orlando v. Fay*, 350 F. 2d 967 (2d Cir. 1965) *cert denied* 384 U.S. 1008 (1966) (to preserve order and decorum in the courtroom).

In *Harris v. Stephens*, 361 F. 2d 888 (8th Cir. 1966) *cert denied* 386 U.S. 964 (1967) an adult was the victim of a rape and the general public was excluded from the courtroom. In rejecting the defendant's claim that he had been denied a public trial, the court noted the "frequent and accepted practice (of excluding the public) when the lurid details of such a crime (rape) must be related by a young lady."

However, in *Tanksley v. United States*, 145 F. 2d 58 (9th Cir. 1944) the public was excluded from a rape trial involving an adult victim, and the court of appeals held that the exclusion violated the defendant's right to be presumed innocent. The court reasoned that the exclusion reflected a predecision by the trial court that the woman was free from fault and should not have to tell her embarrassing story in public. *See also: State v. Holm*, 224 P. 2d 500, 513 (Wyo. 1950) (court upheld exclusion of the general public where victim and defendant were both minors but stated that "(w)hile we see no particular reason why anyone of age should have been excluded from trial, yet we think that under the special facts of this case, we cannot definitely say that the defendant was denied a public trial.")

Recommendations of the Judicial Council

Senate 901 is perhaps the least specific bill designed to protect a rape victim from the embarrassing situation of testifying before the general public. Under S. 901 the testimony of the complaining witness may be heard in closed court. There is no attempt under S. 901 to exclude the general public from the entire proceedings in a rape trial.

House 1710 is much broader in scope than S. 901. Under H. 1710, the general public would be excluded from a *trial* for rape, incest or other crimes involving sex. House 1710 specifically permits the presence of such "persons as may have a direct interest in the case," which S. 901 does not. Furthermore, under H. 1710, the decision to exclude the public is within the discretion of the trial judge.

House 614 is perhaps the broadest of the three bills. In addition to excluding the general public from rape trials, the public would also be excluded from a trial involving the “getting” a woman with an illegitimate child. (In light of the recent Supreme Judicial Court decision in *Commonwealth v. MacKenzie*, 334 N.E. 2d 616 (1975) it is questionable whether this portion of H. 614 is still necessary.)

Most importantly, H. 614 provides that the trial judge *shall* exclude the general public from these trials. Thus, it would appear that no discretion is left with the judge to exclude or to admit the public. House 614 also provides that persons having a direct interest in the case may be present.

We favor an approach to this problem which will balance the interests of the defendant in an open and public trial and the interests of the victim in being free to relate the facts of a case without fear of undue embarrassment. The Constitution guarantees a public trial to criminal defendants. However, it is not only the defendant who has interests in a public trial. The general public also has a right to demand that judicial proceedings are carried out in an open and fair manner. On the other hand, the weight of judicial authority clearly upholds the proposition that reasonable restrictions may be imposed on a defendant’s right to a public trial. We favor legislation giving discretion to the trial judge to protect a victim of a sex crime. We, therefore, recommend H. 614, but with an amendment in Line 8 by striking the word “shall” and inserting in place thereof the words “may at the discretion of the court” so that the sentence will read as follows: “. . . the presiding justice may at the discretion of the court exclude the general public from the courtroom, admitting only such persons as may have a direct interest in the case.”

We therefore recommend the following Draft Act.

1976 DRAFT ACT

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

AN ACT PROVIDING FOR THE EXCLUSION OF THE PUBLIC TRIAL OF CERTAIN SEX OFFENSES.

Chapter 278 of the General Laws is hereby amended by striking out section 16A, as appearing in the Tercentenary Edition, and inserting in place thereof the following section:—

Section 16A. At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, or at the trial of a complaint or indictment for getting a woman with child out of wedlock, or for the non-support of an illegitimate child, the presiding justice may at the discretion of the court exclude the general public from the court room, admitting only such persons as may have a direct interest in the case.

**(C) EVIDENCE — ACCIDENT REPORT
INADMISSIBLE AGAINST MAKER**

HOUSE (1975) No. 1530

**AN ACT PROVIDING THAT AN ACCIDENT REPORT
NOT BE USED IN EVIDENCE AGAINST THE PER-
SON MAKING SUCH REPORT.**

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

- 1 The first paragraph of section 26 of chapter 90 of the
- 2 General Laws is hereby amended by adding the follow-
- 3 ing sentence:—
- 4 Any report filed under the provisions of this section
- 5 shall not be admitted in evidence in any criminal pro-
- 6 ceeding concerning a violation of any provision of this
- 7 chapter in which the person filing such report is the de-
- 8 fendant.

We recommend this bill.

Under the provisions of G.L. Ter. Ed. Ch. 90, §26, we note that accident reports filed with the Registrar of Motor Vehicles are now public records. Such reports have many purposes, one of which is to guide traffic engineers in improving the condition of the highways. The report is also useful to establish the rights of parties to obtain compensation for injuries and other damages. It might be said that the report is also necessary so that the Registrar may determine whether or not an operator involved in an accident has a physical or other defect which might prompt a hearing on the question of fitness of such a person to operate a motor vehicle.

All of these purposes are reasonable and necessary for the protection of the public and the improvement of the highways. It is,

therefore, desirable that operators be required to make a written report of accidents where there is personal injury, death, or damage in excess of \$200.

At the same time it is very easy to see that an operator could incriminate himself and subject himself to the penalties of fine or imprisonment on the basis of the information put in such a report. Since the report is required by law, the alternative being suspension or revocation of license, the privilege against self-incrimination arises.

We do not believe that an operator of a motor vehicle should be forced to incriminate himself and because the report is a necessary thing, it is a wise idea to amend this statute to insure that proper reports will be made in all cases, while at the same time eliminating the possibility of self-incrimination.

(D) MISDEMEANORS — ISSUANCE OF CITATIONS
BY POLICE OFFICERS

HOUSE (1975) No. 3536

AN ACT PROVIDING FOR THE ISSUANCE OF CITATIONS BY POLICE OFFICERS TO PERSONS CHARGED WITH MISDEMEANORS AND VIOLATIONS OF ANY ORDINANCE, RULE, BY-LAW OR REGULATION PUNISHABLE BY LAW; AND ESTABLISHING AN EXPEDITIOUS PROCEDURE FOR THE PROSECUTION AND TRIAL OF SUCH OFFENSES.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Chapter 276 of the General Laws is
2 hereby amended by inserting after section 27 the follow-
3 ing sections:—

4 Section 27A. (a) The definitions contained in section
5 one of chapter ninety C shall apply, as context permits,
6 to this section; and unless the context otherwise re-
7 quires, the following words shall have the following
8 meanings:—

9 “Citable offense,” any misdemeanor except libel, or
10 any violation of an ordinance, rule, by-law or regulation,

11 including an automobile law violation, which is punishable
12 by law, except a violation of any rule, regulation,
13 order, ordinance or by-law regulating the parking of
14 motor vehicles established by any city or town or by
15 any commission or body empowered by law to make
16 such rules and regulations therein.

17 "Citation," a written notice or order to appear in
18 court to answer to a complaint for any citable offense.
19 Citation shall, except as otherwise indicated, include
20 auto citation; but the provisions of chapter ninety C
21 shall also apply to auto citations.

22 (b) A police officer who has probable cause to believe
23 that a person has committed a citable offense may, sub-
24 ject to the regulations to be issued pursuant to subsection
25 (h), issue to such person a citation to appear in
26 court to answer to a complaint, whether or not the of-
27 ficer may arrest such person. When a citation is issued
28 in lieu of arrest, or when the person to be cited may not
29 be arrested, the officer may stop and briefly detain such
30 person for the purpose of identifying him and issuing a
31 citation, but if no arrest is made such detention shall not
32 be deemed an arrest for any purpose.

33 (c) Subject to the regulations to be issued pursuant to
34 subsection (h) an officer who has arrested a person
35 without a warrant for a citable offense may, after such
36 arrest, issue to such person a citation in lieu of taking
37 him to a police station; and such officer, or a supervisor
38 or superior of such officer, may issue a citation to and
39 release such person after such person has been taken to
40 a police station at any time before such person is
41 brought before a court.

42 (d) Citations issued pursuant to subsections (b) and
43 (c) shall be on a form approved by the chief justice of
44 the district courts and the chief justice of the municipal
45 court of the City of Boston, and shall contain, in addition
46 to the information required by the provisions of section
47 twenty-seven B, the name and address of the person
48 cited; the approximate time and place of the offense
49 or offenses charged; a reasonable description, name,
50 title, or designation of the offense or offenses charged;
51 the name and location of the court in which the person
52 cited shall appear and the time and date when the person
53 cited shall appear, which date shall be not less than
54 five, Sundays, and holidays excepted, nor more than
55 twenty-one days from the date on which the citation is
56 issued, and a promise by the person cited to appear at
57 the time and place mentioned in the citation to answer
58 to a complaint. If an auto citation is issued to a person
59 who is to be charged with the commission of one or

60 more citable offenses in addition to an automobile law
61 violation, all such offenses may be noted on the auto ci-
62 tation issued to such person.

63 One copy of the citation shall be filled out and signed
64 by the issuing officer and delivered to the person cited,
65 and such person shall sign a duplicate citation, which
66 shall be retained by the officer. The signing of the dupli-
67 cate citation by the person cited shall not be deemed an
68 admission of guilt, but shall be held a lawful promise
69 and recognizance to appear in court as directed. The of-
70 ficer shall, subject to the regulations to be issued pur-
71 suant to subsection (h), thereupon release the cited per-
72 son from arrest or detention, unless such person refuses
73 to sign the duplicate citation, or fails reasonably to iden-
74 tify himself, in which case such person may be arrested
75 pursuant to subsection (e), or retained in custody if he is
76 already under arrest.

77 (e) Any person detained by an officer for the purpose
78 of being issued a citation pursuant to subsection (b) who
79 fails reasonably to identify himself or who refuses to
80 sign the duplicate citation as required for release by
81 subsection (d) may be arrested without a warrant; pro-
82 vided, however, that such person shall not be ineligible
83 for release upon citation at a later time pursuant to sub-
84 section (c) and (d).

85 (f) An officer who has issued a citation shall promptly
86 deliver to his police chief, or to any person authorized
87 by said police chief, the duplicate citation and all other
88 copies of the citation, except a copy to be retained by
89 him. Said police chief, or person authorized by him,
90 shall, except in the case of an auto citation issued as a
91 warning, or except as otherwise excused by law, present
92 a duly executed and sworn application for a complaint
93 for each offense mentioned in the citation, accompanied
94 by the duplicate citation, whether or not signed by the
95 person cited, and in the case of all auto citations, the
96 copy comprising the registry of motor vehicles record,
97 to a court having jurisdiction at a time no later than
98 three days after the date on which the citation was is-
99 sued. Sundays and holidays excepted. Applications for
100 complaints may also be presented for citable offenses
101 other than an automobile law violation arising out of the
102 same event or transaction in connection with which a ci-
103 tation was issued which are not mentioned in the cita-
104 tion. Arraignment of the person cited shall be set down
105 for the day designated on the citation.

106 If the duplicate citation and at least one application
107 for a complaint are not presented to the court by the
108 police chief or his authorized representative, or if no

such application is granted, a written notice that a complaint has not been filed or has been refused and that the person cited is released from his obligation to appear shall be promptly mailed to such person by the police chief or his authorized representative; and if a complaint and summons or warrant is sought pursuant to the provisions of subsection (g), but is denied by the court, such notice shall be made by the clerk.

(g) Whoever, without reasonable cause, fails, after having been issued a citation to appear in court as promised at the time and place designated on the citation shall be punished as provided in section twenty-six. A summons or warrant, if necessary, may be issued at any time after the issuance of a citation, whether the person cited has failed to appear or not.

If a person to whom a citation has been issued fails to appear as promised at the time and place designated in the citation, the court shall issue a warrant for his arrest or a summons as provided by sections twenty-four and twenty-five; but if a person so summoned fails, without reasonable cause, to appear and abide the orders of the court or justice a warrant for his arrest shall issue forthwith, and he shall be considered in contempt of court for failure to obey such summons, and for such contempt shall be punished by imprisonment in the house of correction for not more than sixty days, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment.

(h) Police Chiefs shall issue regulations which shall set out the circumstances in which officers in their respective departments shall and shall not issue citations in lieu of arrest pursuant to the provisions of subsections (c) and (d). Such regulations shall be designed to protect the peace of the citizens of the Commonwealth while providing the maximum use of citations, so that persons reasonably believed to have committed citable offenses will be apprehended, cited, and expeditiously prosecuted, but will be arrested or retained in custody only when necessary in the public interest.

Police chiefs shall issue citation forms to such members of their departments as they shall determine, which forms shall be used for the issuance of all citations pursuant to the provisions of this section except auto citations, which shall be issued in conformity with the provisions of chapter ninety C.

Section 27B. The clerk of a district court or an assistant clerk or other person designated by said clerk shall accept waiver of trial, plea of guilty, and payment of

fine from any person to whom a citation including an auto citation, has been issued pursuant to the provisions of section twenty-seven A, or who has been summoned pursuant to the provisions of section twenty-four, to appear before such court on a complaint alleging violation of any law other than a law regulating the conduct of any public official and other than a parking violation, for which the punishment is a fine or forfeiture not exceeding the sum of fifty dollars and does not include a sentence of imprisonment. Judgement shall be entered against any person filing such waiver of trial and plea of guilty. Such waivers and pleas shall be made in writing on forms which shall be established by the chief justice of the municipal court of the city of Boston for said court and by the chief justice of the district courts for all other district courts. Such forms shall also contain instructions to offenders as to procedure under this section, and shall, with respect to summonses other than for parking violations, contain information for the use of probation officers. Fines under this section shall be in accordance with a schedule of fines which shall be established by the chief justice of the municipal court of the city of Boston for said court, and by the senior justice of each other district court with the approval of the chief justice of the district courts, for each such other district court. A copy of such schedule of fines shall be so posted as to be plainly visible to the public in the office of the clerk of each district court. The fines listed on said schedule shall not exceed the maximum fines established by law for the particular type of violation.

The clerk, assistant clerk or other person designated by said clerk shall inform persons to whom a citation has been issued pursuant to section twenty seven A of his right to proceed with waiver of trial, plea of guilty and payment of fine as provided in paragraph one of this section on the date said person appears for arraignment. If said person elects not to proceed as aforesaid, he shall be arraigned and the procedure for criminal cases followed.

No such waiver, plea, and payment of fine shall be accepted under this section unless made before said clerk, either personally or by an agent duly authorized in writing. Such payment shall be made by cash or postal note, money order, or check made out to the clerk of court.

This section shall not apply to any person who has been summoned for failure to properly return a parking violation notice in accordance with section twenty A or section twenty C of chapter ninety, nor to any person

206 who has been previously convicted, within a period of
207 twelve months, of the violation of any law nor, without
208 special permission of the chief justice of the municipal
209 court of the city of Boston or the senior justice of each
210 other district court, as the case may be; to any com-
211 plaint wherein the court has issued a warrant for failure
212 of the defendant to appear on a summons, properly
213 served; nor to any delinquent child as described in sec-
214 tion fifty eight B of chapter one hundred and nineteen.

|

1 SECTION 2. Chapter 90C of the General Laws is
2 hereby amended by striking sections 1, 2, 3, 4, 4A, 6,
3 6A thereof, and inserting in place thereof the following
4 sections:—

5 *Section 1.* In this chapter, unless the context other-
6 wise requires, the following words shall have the follow-
7 ing meanings:

8 “Audit sheet,” a sheet of paper which shall contain a
9 list of the issuance and disposition of each auto citation
10 in such form as the registrar shall approve, and which
11 shall include but need not be limited to the following
12 information:— the police department or organization to
13 which the audit sheet was issued, the offense, the name
14 and address of the offender, the name of the issuing of-
15 ficer and the disposition.

16 “Auto citation,” a citation issued pursuant to the
17 provisions of subsections (b) or (c) of section twenty-
18 seven A of Chapter two hundred and seventy-six upon
19 which a police officer shall record an occurrence involv-
20 ing one or more automobile law violation by the person
21 cited. An auto citation may be issued as a warning with-
22 out a complaint being applied for, as provided in section
23 two. Each auto citation shall be numbered consecutively
24 in such form as the registrar shall approve and shall
25 consist of the following parts:— (1) the original to be
26 given or delivered to the offender as provided in subsec-
27 tion (d) of section twenty-seven A of Chapter two
28 hundred and seventy-six; (2) a duplicate which shall be a
29 copy of the original and which when completed and
30 signed by a police officer shall accompany the applica-
31 tion for a complaint to the appropriate district court as
32 provided in subsection (f) of section twenty-seven A; (3)
33 the registry of motor vehicles record, which shall be a
34 copy of the original and the reverse side of which shall
35 be an abstract of the court record in accordance with the
36 provisions of section twenty-seven of chapter ninety; (4)
37 the police record, which shall be a copy of the original,
38 the reverse side of which shall record the disposition of

the charge and shall be retained by the police department or organization; (5) a copy of the original which shall be retained by the police officer who makes out the auto citation. The citation to be given to the offender shall have printed thereon a statement that the person cited therein shall, if he so requests in writing to the appropriate court within twenty-four hours of the alleged violation, be granted a hearing on said violation before any process shall issue, as provided in section thirty-five A of Chapter two hundred and eighteen.

“Auto citation book,” twenty-five auto citations, stapled or bound together in book form. Each such book shall be consecutively numbered.

“Automobile law violation,” any violation of any statute, ordinance, by-law or regulation relating to the operation or control of motor vehicles other than a felony, and other than a violation (1) of any rule, regulation, order, ordinance or by-law regulating the parking of motor vehicles established by any city or town or by any commission or body empowered by law to make such rules and regulations therein, or (2) of any provision of chapter one hundred and fifty-nine B.

“Police chief,” the chief or the head of the organized police department of a city or town, the commissioner of public safety, the superintendent of the metropolitan district commission police, the registrar of motor vehicles, the state superintendent of buildings, the chairman of the Massachusetts Turnpike authority, such persons as the trustees of the University of Massachusetts shall appoint as chief of the police officers appointed under section thirty-two A of chapter seventy-five, such persons as the commissioner of mental health may designate at each institution of the department of mental health as chief of the special police officers thereat appointed under section ten B of chapter one hundred and forty-seven.

“Police officers,” any officer, other than an investigator or examiner of the commercial motor vehicle division of the department of public utilities, authorized to make arrest or serve criminal process, any person appointed by the registrar under section twenty-nine of chapter ninety, any person appointed by the trustees of the University of Massachusetts under section thirty-two A of chapter seventy-five, and any person appointed by the commissioner of public safety under section ten B of chapter one hundred and forty-seven.

“Registrar,” the registrar of motor vehicles.

Section 2. Each police chief shall issue auto citation books to each permanent full-time police officer of his

88 department whose duties may or will include traffic duty
89 or traffic law enforcement, or directing or controlling
90 traffic, and to such other officers as he at his discretion
91 may determine. Each police chief shall obtain a receipt
92 on a form approved by the registrar from such officer to
93 whom an auto citation book has been issued. Each
94 police chief shall also maintain auto citation books at
95 police headquarters for the recording of automobile law
96 violations by police officers to whom auto citation
97 books have not been issued.

98 Any police officer assigned to traffic enforcement
99 duty shall, whether or not the offense occurs within his
100 presence, record the occurrence of automobile law vio-
101 lations upon an auto citation, filling out the auto citation
102 and each copy thereof as soon as possible and as com-
103 pletely as possible and indicating thereon whether a
104 complaint shall be applied for, or whether a written
105 warning shall be issued. Said police officer shall inform
106 the offender of the violation and shall give the original of
107 the citation to the alleged offender, as provided in sec-
108 tion twenty-seven A of chapter two hundred and
109 seventy-six.

110 At or before the completion of his tour of duty a
111 police officer to whom an auto citation book has been
112 issued and who has recorded the occurrence of an au-
113 tomobile law violation upon an auto citation shall de-
114 liver to his police chief or to the person duly authorized
115 by him all remaining copies of such auto citation duly
116 signed, except the police officer's copy which shall be
117 retained by him. If the police officer has directed that an
118 application for a complaint be filed, said police chief or
119 person authorized by him shall proceed pursuant to the
120 provisions of subsection (f) or subsection (g) of section
121 twenty-seven A of chapter two hundred and seventy-
122 six. If the police officer has directed that a written warn-
123 ing be issued, the part of the auto citation designated as
124 the registry of motor vehicles' record shall be forwarded
125 forthwith by the police chief or person authorized by
126 him to the registrar of motor vehicles and shall be kept
127 by the registrar in his main office. If the registrar re-
128 ceives three such written warnings to the same offender
129 within any calendar year, he shall forthwith suspend the
130 license or right to operate of such person for a period of
131 seven days, from which suspension there shall be a right
132 of appeal in accordance with the provisions of section
133 twenty-eight of chapter ninety; provided, however, that
134 such an appeal shall stay the operation of such suspen-
135 sion. The decision of the board of appeals on motor veh-
136 icle policies and bonds shall be final on such an appeal.

137 If an auto citation is spoiled, mutilated or voided, it
138 shall be endorsed with a full explanation thereof by the
139 police officer voiding such auto citation, and shall be
140 duly accounted for upon the audit sheet for the auto ci-
141 tation book in which said auto citation had been in-
142 cluded.

143 Nothing in this section shall prevent a person other
144 than a police officer from applying for a criminal com-
145 plaint for an automobile law violation, and such person
146 need not show that the alleged offender has been issued
147 an auto citation in connection with such offense.

148 *Section 3.* The registrar shall, with the approval of the
149 chief justice of the district courts or chief justice of the
150 municipal court of the city of Boston as provided in sub-
151 section (d) of section twenty-seven A and in section
152 twenty-seven B of chapter two hundred and seventy-six,
153 prepare auto citation books and distribute the same to
154 each police chief, and shall obtain receipts thereof. Each
155 police chief shall accept and be responsible for all auto
156 citation books issued to his department. The registrar
157 shall also furnish two audit sheets with each auto cita-
158 tion book, said audit sheets to have the same number as
159 the auto citation book.

160 When an auto citation has been completed the police
161 chief or an officer of a rank not less than sergeant, or in
162 the case of the state police of a rank not less than cor-
163 poral and who is in charge of a state police barracks,
164 shall record the issuance and disposition of said auto ci-
165 tation and enter the required information upon the audit
166 sheet. When the twenty-five auto citations in an auto ci-
167 tation book are issued or used, the police chief shall sign
168 and return a completed audit sheet to the registrar,
169 keeping the other audit sheet for the files of his depart-
170 ment. The registrar may at any time demand and inspect
171 any auto citation, auto citation book or audit sheet used
172 by any police department, or police chief.

173 *Section 4.* If any person to whom an auto citation to
174 appear in court has been issued or who has been sum-
175 moned to appear before a court for an automobile law
176 violation fails without good cause to appear at the time
177 and place specified on said auto citation or summons,
178 and has failed to comply with the provisions of section
179 four A, the clerk of court to which said auto citation or
180 summons was returnable shall immediately notify the
181 registry who shall suspend any motor vehicle license
182 issued to such person, and such person shall not be eli-
183 gible for reinstatement of his license until he shall have
184 appeared before said court and answered to the charge
185 made against him.

186 *Section 6.* It shall be unlawful and official misconduct
187 to dispose of an auto citation or copies thereof, or of the
188 record of the issuance of same in a manner other than as
189 required herein.

190 *Section 6A.* Whoever knowingly falsifies an auto cita-
191 tion or copies thereof or a record of the issuance of
192 same, or disposes of such auto citation, copy, or record,
193 in a manner other than as required in this section, or at-
194 tempts so to falsify or dispose, or attempts to incite or
195 procure another so to falsify or dispose shall be
196 punished by a fine of not more than five hundred dollars
197 or by imprisonment for a term not to exceed one year,
198 or both.

1 SECTION 3. Chapter 90 of the General Laws is
2 hereby amended by striking out section 18A, as most
3 recently amended by chapter 128 of the Acts of 1964,
4 and inserting in place thereof the following section:—

5 *Section 18A.* The department on ways within their
6 control and at the intersection of state highways, and
7 other ways, the metropolitan district commission on
8 ways within their control and at the intersection of met-
9 ropolitan district commission roadways, except state
10 highways, and other ways, the traffic and parking com-
11 mission of the city of Boston, the traffic commission or
12 traffic director of any city or town having such a com-
13 mission or director with authority to promulgate traffic
14 rules, the city council of any other city, and the board of
15 selectmen of any other town may, subject to the provi-
16 sions of section two of chapter eighty five, adopt,
17 amend and repeal rules, not repugnant to law, regulating
18 the use by pedestrians of ways within their respective
19 control; provided, however, that no such rule adopted
20 by said traffic and parking commission or by any such
21 traffic commission or traffic director, any city council or
22 any board of selectmen shall take effect until approved
23 in writing by the department, nor, in the case of any
24 such rule adopted by said traffic and parking commis-
25 sion, until published in the city record, or, in the case of
26 any other such rule, until published in a newspaper pub-
27 lished in the city or town in which such rule is to be ap-
28 plicable, if any, otherwise in the county wherein such
29 city or town lies. As used in this paragraph, the word
30 “pedestrian” shall include a person in or on any con-
31 veyance, other than a bicycle, constructed and designed
32 for propulsion by human muscular power, as well as in-
33 cluding a person on foot. Whoever violates any provi-
34 sion of any such rule shall be punished by a fine of not
35 more than twenty-five dollars for the first, second or

36 third such offense committed by such person within the
37 jurisdiction of the district court in the particular calen-
38 dar year, and by a fine of not more than fifty dollars for
39 the fourth or subsequent such offense so committed in
40 such calendar year.

41 A violation of any provision of any such rule or of any
42 provision of this section shall not, in any civil proceed-
43 ing, constitute negligence or be admissable as evidence
44 of negligence, nor shall a conviction for such a violation
45 be shown to affect the credibility of a witness in any
46 proceeding.

47 The provisions of this section relative to ways within
48 the control of cities or towns shall be effective in cities
49 or towns accepting said provision; provided, however,
50 that at any time after the expiration of two years from
51 the time of any such acceptance a city or town may, in
52 the same manner as such provisions were accepted, re-
53 voke the same.

1 SECTION 4. Section sixty of chapter two hundred
2 and seventy-two of the General Laws, as inserted by
3 section one of chapter four hundred and thirty-six of the
4 Acts of nineteen hundred and ten, is hereby repealed.

Summary Court Proceedings For Certain Misdemeanors

In 1962 by Chapter 789 § 2 of the Acts of 1962 a new Procedure Against Violators of Motor Vehicle Laws was enacted. Under this new procedure an individual could be given a citation or so-called "ticket" after an automobile law violation (except parking). In issuing the citation, the police officer has the option to make an arrest, give a warning, or apply for a complaint in the proper district court. A duplicate of the citation goes to the Registrar of Motor Vehicles.

The new procedure makes it unnecessary to arrest an offender in all cases, but the most important section of Ch. 90C so far as expediting the work of the court is concerned is § 4A.

Under § 4A, as amended by Ch. 424, § 3 and 4 of the Acts of 1974, the alleged offender may waive trial, enter a plea of guilty, and pay a fine by mail.

The schedule of fines for these automobile violations is to be established by the Judiciary and placed in public view.

Persons who have committed more than one offense in any one year are not entitled to use this procedure. In addition to the au-

tomobile offenses now covered by Ch. 90C, the proponents of House (1975) 3536 desire to apply the Ch. 90C procedure to other kinds of citable offenses.

A "citable offense" is defined in House (1975) 3536 as follows:

"Citable offense, any misdemeanor except libel, or any violation of an ordinance, rule, by-law or regulation, including an automobile law violation, which is punishable by law, except a violation of any rule, regulation, order, ordinance or by-law regulating the parking of motor vehicles established by any city or town or by any commission or body empowered by law to make such rules and regulations therein."

We do not recommend this bill. The extension of the use of a "traffic ticket" so that it will cover a case of "aiding a prisoner to escape from custody" (G.L. 268 § 17) does not make for good judicial administration nor is it in the public interest. The misdemeanor mentioned here is but one of a hundred which ought to be dealt with by the Court. The Judiciary encounters many persons whose offenses, while not of major proportion, give indication of the need of assistance from the probation service or some social service agency.

In the opinion of an experienced District Court judge who daily handles the criminal business of a metropolitan district court, many persons who would be allowed by this proposed statute to pay fines by mail or otherwise avoid an actual appearance before the Court should be obliged to undergo the experience of coming into court and making a public answer for their conduct. In some instances, such an appearance in Court would be the jolt that an individual might need to convince him to take a healthier attitude towards his fellow man.

We make special note of the fact that in the case of the automobile violations, a copy of the citation is also sent to the Registrar of Motor Vehicles and becomes part of the permanent file of the offender. It is probable that this factor of the present "traffic ticket" serves as a great deterrent to the normal person and even more so than the small fines.

(E) REORGANIZING THE SYSTEM OF PROBATION
IN THE COMMONWEALTH

SENATE (1975) No. 678

AN ACT REORGANIZING THE SYSTEM OF PROBATION SERVICES IN THE COMMONWEALTH.

The Senate and House of Representatives here assembled find and declare that

The Commonwealth's system of criminal justice would be enhanced by creating greater uniformity and coordination within the probation system; and

This can best be achieved by a transfer of responsibility for the system to the executive branch of government; and

Such a transfer would facilitate a more rational allocation of probation services, and increase interaction and administrative coordination with corrections and allied human services,

Therefore,

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. This Act shall be cited as the "Probation Services Reform Act of 1975."

1 SECTION 2. Section 83 of Chapter 276 of the General Laws is hereby amended by striking that section
2 and inserting in place thereof the following new section.
3

4 "The Commissioner of Probation may appoint such
5 male and female probation officers as he may deem
6 necessary for the various courts; provided, that he shall
7 appoint only one probation officer to serve the probate
8 court of the counties of Barnstable and Nantucket and
9 the County of Dukes County, and the probate court of
10 the counties of Hampshire and Franklin; provided,
11 further, that no person shall be appointed until his or her
12 qualifications have been examined by the Commissioner
13 of Probation and approved by him as meeting standards
14 established by the Council on Probation, as provided in
15 Section 99A; except that no application for appointment
16 shall be disqualified automatically because of nonpos-
17 session of a bachelor's degree from an accredited col-
18 lege if the council on probation considers he has the

19 practical equivalent thereof. In a probation office of any
20 court, other than the municipal court of Boston, having
21 two or more probation officers, one may be designated
22 chief probation officer; in any such probation office hav-
23 ing five or more probation officers, for each five such
24 officers, one may be designated as assistant chief proba-
25 tion officer; and in any such probation office having
26 three or more assistant chief probation officers, one may
27 be designated as first assistant chief probation officer.
28 The Commissioner shall designate one probation officer
29 of the Superior Court as supervisor of probation, and
30 one probation officer as assistant supervisor of proba-
31 tion for said court. He shall also designate such proba-
32 tion officers for the municipal court of Boston as fol-
33 lows: Chief probation officer, first assistant chief proba-
34 tion officer, second assistant chief probation officer, two
35 deputy probation officers and probation officer. The
36 phrase "probation officer" as used in this section shall,
37 unless the context otherwise requires, be construed to
38 include chief probation officer, assistant chief probation
39 officer, supervisor of probation, assistant supervisor of
40 probation, first assistant chief probation officer, second
41 assistant chief probation officer and deputy probation
42 officer.

43 The compensation of probation officers on all of the
44 courts of the Commonwealth shall be fixed according to
45 schedules established in Section 99B. The compensation
46 of each probation officer appointed by the Commis-
47 sioner to the Superior Court and the various probate
48 courts shall be paid by the Commonwealth. The com-
49 pensation of probation officers in district courts, in the
50 municipal court of Boston, and in the Boston Juvenile
51 Court, the Worcester Juvenile Court, the Bristol
52 County Juvenile Court and the Springfield Juvenile
53 Court shall be paid by the County on vouchers ap-
54 proved respectively by the Commissioner of Probation
55 and the Secretary of Human Services. The Commis-
56 sioner of Probation shall annually, not later than the
57 first Wednesday of December, submit to the County
58 Commissioners of the various counties estimates of the
59 amounts necessary to pay the compensation for the en-
60 suing year of the probation officers appointed under this
61 section, and said county commissioners shall include
62 such estimates in the estimates required by Section 28 of
63 Chapter 35. The Commissioner shall further, annually,
64 before the first day of November, submit to the Super-
65 visor of Budgets of the city of Boston estimates of the
66 amounts necessary to pay the compensation for the en-
67 suing year of the probation officers appointed under this

68 section, and said estimates shall be included in the
69 county budget of Suffolk County for the ensuing year. A
70 probation officer may be removed or demoted for cause
71 by the Commissioner; provided that no probation officer
72 may be removed, demoted or discharged from office by
73 said Commissioner unless such removal, demotion, or
74 discharge, shall be approved in writing by the council on
75 probation.

76 Effective as of July first, nineteen hundred and forty
77 nine, every person serving on said date as a probation
78 officer, junior probation officer, senior probation of-
79 ficer, probation supervisor, or chief probation officer in
80 a district court in Suffolk county other than the municip-
81 al court of Boston, or the Boston Juvenile Court, until
82 designated as a chief probation officer or an assistant
83 chief probation officer under this section, serve as a
84 probation officer subject to the provisions of this sec-
85 tion, and for services rendered on and after said July
86 first, 1949, shall be compensated as if the provisions of
87 this section as now in force had been in force, and con-
88 tinuously since, the time of his original appointment as a
89 probation officer. Every person shall be given such
90 credit for years of similar service in allied fields as the
91 Council on Probation may determine.

92 Effective as of July 1, 1951, every person serving on
93 said date as a probation officer, deputy probation of-
94 ficer, chief probation officer, first assistant chief proba-
95 tion officer, second assistant chief probation officer in
96 the Municipal Court of Boston, shall, until designated as
97 a chief probation officer, first assistant chief probation
98 officer, second assistant chief probation officer, or dep-
99 uty probation officer under this section, serve as a pro-
100 bation officer subject to the provisions of this section.

1 SECTION 3. Section 83A of Chapter 276 of the
2 General Laws is hereby amended by striking said sec-
3 tion and inserting in place thereof the following new
4 section:—

5 The Commissioner of Probation shall appoint proba-
6 tion officers to act exclusively in juvenile cases in such
7 district courts as he shall deem necessary. In such a
8 court, he shall appoint not less than one male and one
9 female probation officer to act as aforesaid. He may
10 further require that such female probation officer so ap-
11 pointed to perform such other duties in connection with
12 adult female probation as are not inconsistent with her
13 primary duties as probation officer in juvenile cases.

14 The provisions of law and compensation applicable to
15 probation officers under section 83 or 89 shall, so far as

16 they may be pertinent and not inconsistent herewith,
17 apply to probation officers appointed hereunder.

1 SECTION 4. Section 88 of Chapter 276 of the Gen-
2 eral Laws is hereby amended by striking out such sec-
3 tion and inserting in place thereof the following new sec-
4 tion:

5 The Commissioner of Probation may employ such
6 clerical assistance as he deems necessary to keep,
7 index, and consolidate the records required to be kept
8 by probation officers and for such other work in connec-
9 tion with its probation service as each court's probation
10 officer may require. The compensation for such service
11 together with such other necessary expenses as may be
12 incurred in connection with such work shall be paid by
13 the county upon vouchers approved by the Commis-
14 sioner.

15 The Commissioner may designate and redesignate
16 such district courts, including in such term the Worces-
17 ter Juvenile Court, the Bristol County Juvenile Court
18 and the Springfield Juvenile Court within each of the
19 counties of the Commonwealth as should join in the es-
20 tablishment of a probation district office for the clerical
21 service of the probation officers of the district courts so
22 designated or redesignated. He may then employ such
23 clerical assistance as necessary to keep, index, and con-
24 solidate the records in such form as may be required by
25 the Commissioner of Probation in connection with the
26 probation service of said courts. The compensation for
27 such service, together with such necessary expenses as
28 may be incurred, shall be paid by the county upon
29 vouchers approved by the Commissioner.

1 SECTION 5. Section 89 of the General Laws is
2 hereby amended by striking out said section and insert-
3 ing in place thereof the following new section.

4 The Commissioner of Probation, may, in the case of a
5 vacancy in the position of probation officer or in the ab-
6 sence of a probation officer, appoint a temporary proba-
7 tion officer, who shall receive as compensation for each
8 day's service an amount equal to the rate by the day of
9 the minimum compensation of a regular probation of-
10 ficer according to the salary schedule established by the
11 council on probation. Compensation so paid to a tem-
12 porary probation officer for service rendered in the ab-
13 sence of a probation officer, in excess of thirty days in
14 any one year, shall be deducted from the compensation

15 of the probation officer in whose place such service is
16 rendered, provided, however, that if a probation officer
17 is absent due to illness or physical disability, for a
18 period not exceeding thirty days in any one year, in ad-
19 dition to said thirty days, he shall be deemed to be on
20 sick leave and no such deduction shall be made. Such
21 thirty days sick leave or any portion thereof not used in
22 any year may be accumulated, but shall, in any event,
23 not to exceed ninety days in any consecutive three year
24 period. If the person so appointed holds an office or
25 position, the salary or compensation for which is paid
26 out of the treasury of the Commonwealth, or that of a
27 county or of a municipality, he shall not receive the sal-
28 ary of both offices or positions during the period of such
29 temporary service.

1 SECTION 6. Section 98 of Chapter 276 of the Gen-
2 eral Laws is hereby amended by, a) striking in line 3 of
3 the first paragraph, the words "committee on proba-
4 tion" and inserting in place thereof, the word "Gover-
5 nor." b) Striking in line 6 of the first paragraph, the
6 words "Committee on Probation" and inserting in place
7 thereof, the words "Secretary of Human Services." c)
8 Striking in lines 1 and 6 of the second paragraph, the
9 words "Committee on Probation" and inserting in place
10 thereof, the words "Council on Probation, as estab-
11 lished by Section 99A." d) adding at the end of the first
12 paragraph, the following new sentence, "At all times,
13 the Commission of Probation shall be directly responsi-
14 ble to the Secretary of Human Services."

1 SECTION 7. Section 99 of Chapter 276 of the Gen-
2 eral Laws is hereby amended by striking in line 7 of the
3 first paragraph, the words "Committee on Probation es-
4 tablished by Section 99A" and inserting in place thereof
5 the words "Council on Probation" as established by
6 Section 99.

1 SECTION 8. Section 99 of Chapter 276 of the Gen-
2 eral Laws is hereby amended by adding at the end of
3 Paragraph 1, the following:—

4 He shall further be authorized to transfer probation
5 officers between the various courts under his jurisdic-
6 tion as he shall deem necessary. He shall be responsible

7 for all recruiting, hiring, and firing of probation officers
8 within the Commonwealth, and, with the advice of the
9 Council on Probation established by Section 99A, estab-
10 lish standards of training and experience for the hiring of
11 probation officers.

1 SECTION 9. Section 99A of Chapter 276 of the
2 General Laws is hereby amended by striking out said
3 section and inserting in place thereof the following new
4 section.

5 1) There shall be County Councils on Probations, to
6 be made up of a chief probation officer from each court
7 in each county. These regional councils will meet on a
8 regular basis, and will be chaired by a supervisor of
9 probation. They shall act as a complaint board for local
10 probation officers, and shall report periodically to the
11 Commissioner of Probation on the functioning of proba-
12 tions services in said county.

13 2) There shall also be one Council on Probation,
14 which shall consist of two supervisors of probation, the
15 Secretary of Human Services or his designee, and two
16 district court justices, to be appointed by the Governor
17 for a term not to exceed two years.

18 The Council on Probation shall consult with the
19 Commissioner of Probation as to standards of probation
20 work throughout the Commonwealth.

21 The Council on Probation, in consultation with the
22 Commissioner of Probation shall establish and promul-
23 gate standards for the appointment of probation officers
24 to the courts of the Commonwealth by the Commis-
25 sioner; and shall hear appeals from the decisions of the
26 Commissioner of Probation in the qualifications of pro-
27 bation officers according to such standards.

28 No probation officer may be removed, demoted, or
29 discharged for cause by the Commissioner, until such
30 removal, demotion, or discharge is approved in writing
31 by the Council on Probation. Before the removal or dis-
32 charge of any probation officer, the Council on Proba-
33 tion shall grant a hearing to such officer.

1 SECTION 11. Section 102 of Chapter 276 is hereby
2 amended by striking the words "nor the authority of the
3 courts to approve expenses and disbursements relative
4 to the probation system."

Under the provisions of G. L. Chapter 276 § 83 et seq., probation officers are appointed by the Judiciary and must have certain qualifications.

The Probation Service is supervised by the Commissioner of Probation who is responsible to the Committee on Probation established under G.L. Ch. 276 § 99A which consists of the Chief Justice of the Superior Court, the Probate Court, the Municipal Court of the City of Boston, the District Courts, and two persons appointed by the Chief Justice of the Supreme Judicial Court. It is the assignment of the Committee on Probation to consult with the Commissioner of Probation on the standards of probation work throughout the Commonwealth, standards for the appointment of Probation officers, and general personnel matters.

It is, therefore, manifest that the probation system functions under the authority of the Judicial Department of the Government.

Senate (1975) 678 is based on the supposition that greater uniformity and coordination within the probation system might best be achieved by a transfer of responsibility to the Executive Branch of the Government.

In place of the Committee on Probation consisting of the chief justices of the various courts, there would be a Council on Probation presided over, apparently, by the Secretary of Human Services *or his designee* and consisting of two probation supervisors and two district court judges appointed for a term not to exceed two years.

The Council on Probation would perform the function of the present Judicial Committee on Probation. The proposed plan confuses the necessary constitutional separation of powers to be exercised by the Judicial Department and the Executive Department. Even assuming the arrangement could stand a constitutional attack, the proposal is an administrative enigma.

For the past few years, the General Court has been engaged in a very determined and productive campaign to modernize the judicial system and to construct sound administrative practices within the system. We do not think that it would be a sound administrative practice to "farm out" probation to the Executive Branch. We do not mean to indicate that the probation service is perfect, nor do we indicate that there is no room for improvement. We are opposed to this bill or any similar bill which would

transfer the probation service to the Executive jurisdiction.

In the course of the year, the Judicial Council has applied to the Governor's Committee on Law Enforcement for a special grant to make an extended study of the probation service so that we will be in a position to make positive recommendations for its improvement as a part of the Judicial Branch of the Government. We plan to complete this investigation during 1976 and to file a special report on probation with the General Court in time for the 1977 session.

(F) PENALTIES FOR OBSTRUCTION OF JUSTICE

HOUSE (1975) No. 6169

AN ACT ESTABLISHING PENALTIES FOR THE CRIME OF OBSTRUCTION OF JUSTICE.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 Chapter 268 of the General Laws is hereby amended
2 by adding the following new section:—

3 Section 6C. A person shall be guilty of obstruction of
4 justice if he: (a) intentionally resists, delays or ob-
5 structs, directly or indirectly, a criminal investigator in
6 the performance of his duties, knowing the investigator
7 to be such; or (b) attempts to do any act described in
8 (a); or (c) knowingly gives false information to any crim-
9 inal investigator with intent to induce such investigator
10 to believe that another person, known or unknown, has
11 committed an offense.

12 As used in this section "criminal investigator" means
13 any individual duly authorized by any Department or
14 Agency of the Commonwealth, or of any political sub-
15 division thereof, to conduct or engage in criminal inves-
16 tigation of or prosecutions for, violations of the crim-
17 inal statutes of the Commonwealth.

18 A person found guilty of obstruction of justice shall
19 be punished by a fine of not more than one thousand
20 dollars or by imprisonment in a jail or house of correc-
21 tion for not more than two and one half years, or both
22 such fine and such imprisonment.

HOUSE (1975) No. 5196

In the Year One Thousand Nine Hundred and Seventy-Five.

AN ACT CREATING THE CRIME OF OBSTRUCTION OF JUSTICE.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

- 1 Section 34 of chapter 268 of the General Laws, as ap-
- 2 pearing in the Tercentenary Edition, is hereby amended
- 3 by striking out, in line 2, the words "to intimidate, hin-
- 4 der or interrupt," and inserting in place thereof the
- 5 words:— whoever intimidates, hinders or interrupts.

Existing Massachusetts Statutes Providing Penalties For The Obstruction Of Justice

At the present time, there are several Massachusetts statutes providing penalties for the obstruction of justice. For example, Chapter 268, § 13A makes it a crime to picket or parade in or near a courthouse with the intent to obstruct or interfere with the administration of justice or to influence a judge, juror or witness. Chapter 268, § 13B of the General Laws is directed at punishing one who obstructs justice by threatening, intimidating or offering a gift to a juror or a witness or a person who provides information to a criminal investigator. Chapter 268, § 34 of the General Laws makes it a criminal offense to intimidate, hinder or obstruct an officer in the lawful performance of his duties. Moreover, § 34 punishes a person who disguises himself for the purpose of obstructing the administration of justice. See also, Mass. Gen. Laws Ann. ch. 266, §§ 6 to 8, 11 to 13, 111, 124, 127; Mass. Gen. Laws Ann. ch. 274, § 4.

Effect Of House Bills 6169 And 5196 And Their Construction With Other Statutes

House Bill 6169 differs from Chapter 268, § 13B in its intended purpose. Section 13B is designed to afford protection to a person who provides information to a criminal investigator. Thus, the primary thrust of section 13B is to punish conduct which obstructs or interferes with the giving of information to a criminal investigator. House Bill 6169, on the other hand, is intended to

punish a person who interferes with an investigator in the performance of the latter's duties. It is not directed toward the protection of the informer. Thus, the goals of House Bill 6169 are significantly different than those of Chapter 268, § 13B.

However, there is a possible duplication of the provisions of House Bill 6169 and those of Chapter 268, § 34. Section 34 provides penalties for anyone who:

disguises himself with intent to obstruct the due execution of the laws, or to intimidate, hinder or interrupt an officer or other person in the lawful performance of his duties . . .

House Bill 5196 would amend section 34 by striking the words "to intimidate hinder or interrupt" and insert in substitution thereof "whoever intimidates, hinders or interrupts." The amendment is probably designed to eliminate the construction of the statute as merely prohibiting a person from disguising himself with intent to obstruct, intimidate, hinder or interrupt. The new element of the crime would be actual intimidation, hindrance or interruption of the officer.

However, a criminal investigator, as defined in House Bill 6169, is an official acting in the lawful performance of his duties and presumably would be covered under Chapter 268, § 34. House Bill 6169 would draw a distinction in the case of interfering with a criminal investigator. House Bill 6169 provides much harsher penalties than does Chapter 268, § 34. It therefore appears that the intent and purpose of House Bill 6169 is to impose more severe sanctions for the crime of impeding a criminal investigator than for interference with other officials. The proposal of House Bill 6169 may very well be a reflection of a legislative intent to prevent the type of "cover-up" activities prevalent during the past few years. The bill is broad enough to encompass almost any type of interference with a criminal investigator.

Trends in Obstruction of Justice Legislation

Federal legislation dealing with the crime of obstruction of justice is codified in 18 U.S.C. § 1501 et seq. The federal statutes are very specific in the type of conduct which is prohibited. For example, 18 U.S.C. § 1501 prohibits intentional resistance or assault of a process server. Section 1502 pertains to interference with an extradition agent. Section 1510 deals with the obstruction of a criminal investigation. One major distinction between the federal legislation in this area and House Bill 6169 is that the federal sta-

tutes specify the conduct by which the obstruction is carried out (for example, bribery, misrepresentation, intimidation). With the exception of misrepresentation, House Bill 6169 does not delineate what means of obstructing justice are prohibited.

While the federal statutes are quite specific, the California Penal Code, Title 7, § 148 (1957) and the Model Penal Code, § 242.1 are illustrative of a more general approach to obstruction of justice legislation. Both the California Penal Code and the Model Penal Code provide for a broad and general prohibition against purposely or willfully obstructing the administration of justice.

Recommendations of The Judicial Council

The Judicial Council does not recommend either House Bill 6169 or House Bill 5196. House Bill 6169 is fairly broad and could be easily misconstrued. Moreover, House Bill 6169 creates a new crime where there is no compelling reason to do so. Neither bill would substantially contribute to the better administration of justice.

III. PROBATE

A. Rights of Illegitimate Children

B. Rights of Elderly Persons — Appointment of Conservators

C. Public Conservators

(A) RIGHTS OF ILLEGITIMATE CHILDREN

SENATE (1975) No. 928

AN ACT RELATIVE TO THE RIGHTS OF CHILDREN BORN OUT OF WEDLOCK.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Chapter 207 of the General Laws is hereby
2 amended by striking out section 15 and inserting in place
3 thereof the following new sections: —

4 Section 15A. For the purpose of sections 15B and 15C of
5 this chapter, the term “born in wedlock” shall refer to a child
6 born during the period extending from the date of the mar-
7 riage to its termination by annulment or decree absolute or to
8 300 days after its termination by death, regardless of whether
9 such marriage is subsequently declared void. A child “born
10 out of wedlock” refers to any child born other than during
11 said period.

12 Section 15B. Every child is the legitimate child of its
13 biological parents and the rights and duties existing between a
14 child and its parents shall be the same regardless of whether
15 said child was born in wedlock, except that the rights of a
16 father of an out-of-wedlock child with respect to adoption
17 shall be governed by section 4A of chapter 210 and a child
18 conceived by artificial insemination shall have no rights
19 against a donor who is not the husband of the mother.

20 Section 15C. A proceeding to determine the paternity of a
21 child shall be a civil proceeding and the probate court shall
22 have jurisdiction of said proceeding. Paternity may be deter-
23 mined upon the petition of the child or its guardian, the
24 mother, a person alleging himself to be the father, or the pub-
25 lic authority supporting the child. Except as provided in chap-
26 ter 190, the proceeding shall be brought in the county wherein
27 the respondent resides, but if such residence is outside
28 Massachusetts or if respondent is a public authority, the pro-

29 ceeding may be brought in the county wherein the petitioner
30 resides.

31 The court or the clerk or the register of probate may notify
32 the respondent or appear by the publication of such a form of
33 notice as it or he may require or by delivering to the respon-
34 dent an attested copy of the petition and a summons, or in
35 such other manner as it or he may require. If the respondent
36 does not appear and the court considers the notice defective
37 or insufficient, it may order further notice.

38 No law limiting adjournments or continuances shall apply
39 to proceedings under this section. On the request of any
40 party, a hearing shall be continued until after the birth, mis-
41 carriage or still birth of the child.

42 The proceeding shall be closed to the public, and all re-
43 cords of the proceeding shall be sealed. The rules of evidence
44 and competency of witnesses shall be as in any other civil
45 proceeding in the probate court, and proof shall be by a pre-
46 ponderance of the evidence, except:—

47 (1) where the child is born in wedlock, the child shall be
48 presumed to be the child of the mother's husband, and such
49 presumption may be rebutted only by clear and convincing
50 evidence:

51 (2) where the child is born out of wedlock:

52 (a) if the proceeding is heard after the death of the alleged
53 father, proof shall be by clear and convincing evidence, un-
54 less the father's estate is seeking to have his paternity af-
55 firmed, or

56 (b) if any person is seeking to set aside an un rebutted ack-
57 nowledgment of paternity as provided in section 15D of this
58 chapter, proof shall be by clear and convincing evidence.

59 In any proceeding under this section, the court may order
60 the mother, her child and the alleged father to submit to one
61 or more blood grouping tests, to be made by a duly qualified
62 physician or other duly qualified person, designated by the
63 court, to determine whether or not the alleged father is the
64 father of the child. If the blood tests exclude the alleged
65 father, the question of paternity shall be resolved accordingly
66 and an appropriate order shall be entered. Blood tests which
67 do not exclude the possibility of the putative father's pater-
68 nity shall be admissible in evidence at the court's discretion
69 along with evidence, if available, of the statistical probability
70 of paternity based on such tests. If one of the parties refused
71 to comply with the order of the court relative to such tests, he
72 shall be guilty of civil contempt of court unless the court, for
73 good cause, otherwise orders. Unless the court otherwise or-
74 ders, the state shall bear the costs of all blood tests ordered by
75 the court pursuant to this section.

76 No criminal action other than under section one of chapter
77 two hundred sixty-eight (relating to perjury) may be brought

78 against the putative father or mother as the result of any evi-
79 dence given by them in a proceeding under this section; pro-
80 vided, however, that a criminal action for nonsupport may be
81 brought under section one of chapter two hundred seventy-
82 three if limited to offenses occurring subsequent to the de-
83 termination of paternity.

84 If the court becomes satisfied that no living child will be
85 born of which the putative father is the father, or that the
86 paternity of the child has been determined, or that adequate
87 provision has been made for its maintenance and that it is for
88 the best interests of the child, the case may be dismissed and
89 any findings vacated; and if the court certifies that it is for the
90 best interest of the child, no further action shall be main-
91 tained under this section.

92 At any time after a finding of paternity, the court may
93 make an order for the payment of money to the mother or to
94 a third party who will apply said money to the care and
95 maintenance of the child.

96 The duty to contribute reasonably to the support of the
97 child shall continue during its minority. The court may order
98 the father to pay the reasonable expenses of the pregnancy
99 and of the confinement of the mother, whether the child is
100 born dead or alive. If the child has died, or if the child dies
101 subsequently, the court may make an order for the payment
102 of its funeral expenses, whether or not other relief is sought.

103 The court may also make such order as may be appropriate
104 concerning the custody or visitation of the child, and from
105 time to time may revise said order as justice and the welfare
106 of the child require. As provided in section fifteen B of this
107 chapter, the standard governing a determination of custody or
108 visitation shall be the same as if the child were born in wed-
109 lock.

110 If a question of paternity arises in any other proceeding in
111 the probate court, the rules set forth in this section shall
112 apply with respect to the determination of paternity.

113 No action may be brought under this section once a final
114 decree of adoption has been rendered with respect to such
115 child.

116 *Section 15D.* Paternity may be acknowledged by the
117 mother and father through affidavits filed with the clerk of the
118 town where the child was born. If the father's affidavit does
119 not accord with the affidavit filed by the mother or if the
120 mother fails to file an affidavit prior to or contemporaneous
121 with the father's affidavit, then the clerk shall give due notice
122 of the father's affidavit to the mother, as provided in chapter
123 forty-six, section thirteen. If she does not contest said af-
124 fidavit within the time provided in said section thirteen, the
125 child shall be considered the child of the alleged father, until a

126 contrary determination of paternity is made upon clear and
127 convincing evidence in a proceeding under section fifteen B
128 of this chapter.

1 SECTION 2. Chapter 210 of the General Laws is hereby
2 amended by inserting the following section:—

3 *Section 4A.* Whenever the mother of a child born out of
4 wedlock has surrendered the child in accordance with section
5 two of this chapter, or whenever the right of the mother to
6 withhold consent for adoption has been terminated in accor-
7 dance with section three, notice of such surrender or termina-
8 tion and a right to petition for adoption shall be afforded to
9 any person who, prior to such surrender or termination has
10 filed a declaration seeking to assert the responsibilities of
11 fatherhood, hereafter referred to as “Paternal Responsibility
12 Claim.” The Paternal Responsibility Claim shall be filed with
13 the department of public welfare on a form devised by said
14 department. The department shall provide the person filing
15 with evidence of the filing and shall send notice of the filing to
16 the mother by registered mail at her address as stated on the
17 claim or to such other address as the department determines
18 to be correct after making every reasonable effort to locate
19 the mother. This constitutes an acknowledgement and admis-
20 sion of paternity.

21 Any person or agency receiving a child for the purpose of
22 adoption shall require the department to search the Paternal
23 Responsibility Claims and the department shall provide an af-
24 fidavit that there has or has not been a Paternal Responsibil-
25 ity Claim filed with respect to such child. If said Claim has
26 been filed, the department will, in addition, notify the person
27 claiming paternity by registered mail, at the address stated on
28 said claim of the receipt of said child and the county in which
29 said child is residing. A copy of the consent executed by the
30 mother in accordance with section two of this chapter or a
31 summary of the court order issued in accordance with section
32 three shall be appended to said notice. A copy of the notice
33 shall be sent to the person or agency requesting the search.
34 The person claiming paternity shall have thirty days from the
35 mailing of said notice by the department to file a petition for
36 adoption or custody of such child in the probate court or the
37 county where the child resides. If he fails to do so, he shall
38 not be entitled to notice of any subsequent proceeding con-
39 cerning custody, guardianship, or adoption of the child. The
40 court shall consider the case as expeditiously as possible,
41 and, without regard to other potential adoptive parents, shall
42 allow the petition of the person claiming paternity if, in the
43 case of an adoption petition, it finds that there are reasonable
44 grounds to believe that he is the father of the child and if it
45 finds that such adoption or custody is to be in the child’s best

46 interest. Any such petition shall be subject to paragraph (E)
47 of section two A of this chapter. Any costs incurred for the
48 temporary care of the child pending the hearing of the father's
49 petition shall be borne by the father.

50 No other petition for adoption shall be allowed without
51 proof of compliance with this section.

1 SECTION 3. Section 7 of chapter 4 of the General Laws,
2 as most recently amended by section 1 of chapter 1050 of the
3 acts of 1973, is hereby amended by striking out clause Sixteen
4 and inserting in place thereof the following clause:—

5 Sixteen "Issue," as applied to the descent of estates shall
6 include all the lineal descendants of the ancestor, including
7 children born out of wedlock.

1 SECTION 4. Section 7 of chapter 4 of the General Laws is
2 hereby further amended by inserting after the fifth clause the
3 following clause:—

4 Fifth A, "Children," shall include children born in and out
5 of wedlock unless the statute expressly excludes children
6 born out of wedlock or is limited to children born in wedlock.

1 SECTION 5. The fourth paragraph of section 12B of chap-
2 ter 32 of the General Laws, as appearing in section 2 of chap-
3 ter 793 of the acts of 1972, is hereby amended by inserting
4 after the word "member" in line 7 the words:—, as well as a
5 child born out of wedlock.

1 SECTION 6. Subsection b of section 2 of chapter 32B of
2 the General Laws, as amended by section 4 of chapter 946 of
3 the acts of 1971, is hereby further amended by inserting after
4 the last sentence the following sentence: — The term "chil-
5 dren" shall include children born out of wedlock.

1 SECTION 7. The second paragraph of section 1 of chapter
2 46 of the General Laws, as most recently amended by chap-
3 ter 358 of the acts of 1968, is hereby further amended by strik-
4 ing out, in line 4, the word "illegitimate" and inserting in
5 place thereof the words: — out of wedlock.

1 SECTION 8. The second paragraph of section 1 of chapter
2 46 is hereby further amended in line 3 by inserting after the
3 word "father" the words: — and mother.

1 SECTION 9. The second paragraph of section 1 of chapter
2 46 is hereby further amended by inserting in line 5 after the
3 word father, the words: — except as provided in section 13 of
4 this chapter.

1 SECTION 10. Section 2A of chapter 46 of the General
2 Laws, as most recently amended by chapter 10 of the acts of
3 1965, is hereby amended by striking out the first sentence
4 thereof and inserting in place thereof the following new sen-
5 tence: — Examination of records and returns of abnormal sex
6 births, or fetal deaths, or of the notices of intention of mar-
7 riage and marriage records in cases where a physician's cer-
8 tificate has been filed under the provisions of section twenty
9 A of chapter two hundred and seven, or of copies of such
10 records in the office of the state secretary, shall not be per-
11 mitted except upon proper judicial order, or upon request of a
12 person seeking his own birth or marriage record, or his attor-
13 ney, parent, guardian, or conservator, or a person whose of-
14 ficial duties, in the opinion of the town clerk or state secre-
15 tary, as the case may be, entitled him to the information con-
16 tained therein, nor shall certified copies thereof be furnished
17 except upon such order, or the request of such person.

1 SECTION 11. Section 3 of chapter 46 of the General
2 Laws, as appearing in section 2 of chapter 358 of the acts of
3 1968, is hereby amended by striking out, in line 8, the word
4 “illegitimate” and inserting in place thereof the words: — out
5 of wedlock.

1 SECTION 12. Section 3 of chapter 46 of the General Laws
2 is hereby further amended by inserting after the word
3 “forth,” in line 9, the words: — except as provided in section
4 13 of this chapter.

1 SECTION 13. Section 3 of chapter 46 of the General Laws
2 is hereby further amended by inserting in line 6, after the
3 word “father” the words: — and mother.

1 SECTION 14. Section 12 of chapter 46 of the General
2 Laws as most recently amended by chapter 401 of the acts of
3 1972 is hereby amended by striking out, in lines 15 and 16 the
4 words “of a child born out of wedlock or.”

1 SECTION 15. The third sentence of the first paragraph of
2 section 3 of chapter 46 of the General Laws, as appearing in
3 section 2 of chapter 358 of the acts of 1968, is hereby re-
4 pealed.

1 SECTION 16. Section 13 of chapter 46 of the General
2 Laws, as most recently amended by chapter 266 of the acts of
3 1971, is hereby further amended by striking out paragraphs 2
4 and 3, and inserting in place thereof the following paragraphs:
5 —

6 In the case of an out of wedlock child whose father was not
7 previously or accurately recorded, upon the determination of
8 his paternity under section fifteen C of chapter two hundred
9 and seven or upon an uncontested acknowledgment under
10 section fifteen D of chapter two hundred and seven, the rec-
11 ord of his birth shall be amended, supplemented or replaced
12 as hereinafter provided so as to read in all respects as if such
13 person has been reported for records as born to such parents
14 in wedlock. For such purpose, the town clerk shall receive a
15 certified copy of a determination of paternity under section
16 fifteen C of chapter two hundred and seven. The town clerk
17 shall also receive written acknowledgment of the child by the
18 putative father in the form of an affidavit. Unless the father's
19 affidavit is accompanied or preceded by a corroborating af-
20 fidavit from the mother, the clerk shall give notice of the
21 father's affidavit to the mother. Failure of the mother to con-
22 test said affidavit to the town clerk within thirty days after re-
23 ceipt of notice shall cause the birth records of the child to be
24 amended, supplemented or replaced to reflect the acknowl-
25 edgment of paternity under section fifteen D of chapter two
26 hundred and seven. If, however, the birth of such a child was
27 recorded as that of a child of the mother and the man who
28 was her husband at the time of such birth, the record shall not
29 be amended or replaced as provided in this section unless the
30 fact of birth out of wedlock has been determined by a pro-
31 ceeding under section fifteen C of chapter two hundred and
32 seven.

33 When the name of the father is amended, supplemented or
34 replaced as provided in the preceding paragraph, the name of
35 the child shall not be changed unless the probate court deter-
36 mines that such change is in the child's best interests.

1 SECTION 17. Section 13 of chapter 46 of the General
2 Laws, as most recently amended by chapter 266 of the acts of
3 1971, is hereby further amended in line 3 of the fourth para-
4 graph, by striking out the word "illegitimate" and inserting in
5 place thereof the words: — an out of wedlock.

1 SECTION 18. Section 13 of chapter 46 of the General
2 Laws as most recently amended by chapter 266 of the acts of
3 1971, is hereby further amended in line 26 of the fifth para-
4 graph by striking out the words "legitimate child" and insert-
5 ing in place thereof the words: — child born in wedlock.

1 SECTION 19. Section 13 of chapter 46 of the General
2 Laws as most recently amended by chapter 266 of the acts of
3 1971, is hereby further amended in the sixth paragraph by
4 striking out the first sentence and inserting in place thereof:—

5 The person upon whose application a record of a birth,
6 marriage or death is corrected or amended, a delayed record
7 of a birth is entered, or a record of a birth of an out of wed-
8 lock child whose paternity is subsequently determined under
9 chapter two hundred and seven, sections fifteen C or fifteen
10 D, is amended shall pay the city or town clerk the fees there-
11 for provided by clauses (11), (12), (13), (14), (29), (30), and
12 (45) of section thirty-four of chapter two hundred and sixty-
13 two.

1 SECTION 20. Section 24 of chapter 46 of the General
2 Laws, as appearing in section 7 of chapter 48 of the acts of
3 1960, is hereby amended by striking out in line 2, the word
4 "illegitimate" and inserting in place thereof the words: — out
5 of wedlock.

1 SECTION 21. Section 24 of chapter 46 of the General
2 Laws is hereby further amended by striking out, in line 3, the
3 word "illegitimate" and inserting in place thereof the word:
4 — out of wedlock.

1 SECTION 22. Section 29 of chapter 114 of the General
2 Laws, as appearing in the Tercentenary Edition, is hereby
3 amended by inserting after the last sentence the following
4 sentence: — Children, within the meaning of this section,
5 shall also include children born out of wedlock.

1 SECTION 23. Subsection c of section 32 of chapter 152 of
2 the General Laws, as amended by section 4 of chapter 738 of
3 the acts of 1950, is hereby amended by inserting after the last
4 sentence the following sentence: — Children, within the
5 meaning of this paragraph, shall also include children born
6 out of wedlock.

1 SECTION 24. Subsection d of section 32 of chapter 152 of
2 the General Laws, as most recently amended by section 4 of
3 chapter 738 of the acts of 1950, is hereby amended by insert-
4 ing after the last sentence the following sentence: — Chil-
5 dren, within the meaning of this paragraph, shall also include
6 children born out of wedlock.

1 SECTION 25. The second paragraph of section 132A of
2 chapter 175 of the General Laws, as appearing in section 5 of
3 chapter 769 of the acts of 1967, is hereby amended by insert-
4 ing after the word "children" in line 13, the words:—, includ-
5 ing children born out of wedlock.

1 SECTION 26. Section 1 of chapter 190 of the General
2 Laws, as most recently amended by section 1 of chapter 637
3 of the acts of 1970, is hereby amended by inserting after the

4 first paragraph the following paragraph:—

5 Issue and children, within the meaning of this section, shall
6 include issue and children born out of wedlock.

1 SECTION 27. Section 3 of chapter 190 of the General
2 Laws, as amended by chapter 149 of the acts of 1959, is
3 hereby amended by inserting after the first paragraph the fol-
4 lowing paragraph:—

5 Issue and children, within the meaning of this section, shall
6 include issue and children born out of wedlock.

1 SECTION 28. Sections five, six and seven of chapter one
2 hundred and ninety of the General Laws are hereby repealed.

1 SECTION 29. Section 20 of chapter 191 of the General
2 Laws, as amended by section 2 of chapter 479 of the acts of
3 1969, is hereby further amended by inserting after the last
4 sentence the following sentence: — Children, within the
5 meaning of this section, shall include children born out of
6 wedlock.

1 SECTION 30. Section 22 of chapter 191 of the General
2 Laws, as most recently amended by chapter 411 of the acts of
3 1971, is hereby amended by inserting after the word “chil-
4 dren” in line 6, the words: — and children born out of wed-
5 lock.

1 SECTION 31. Section 1 of chapter 196 of the General
2 Laws, as appearing in the Tercentenary Edition, is hereby
3 amended by inserting after the first paragraph the following
4 paragraph:—

5 The term “child” or “children” as used in this chapter
6 shall include a child or children born out of wedlock.

1 SECTION 32. Section 6 of chapter 207 of the General
2 Laws, as appearing in the Tercentenary Edition, is hereby
3 amended by striking out, in lines 12 and 13 the words “and
4 the issue of such subsequent marriage shall be considered as
5 the legitimate issue of both parents.”

1 SECTION 33. Sections fifteen, sixteen and seventeen of
2 chapter two hundred and seven of the General Laws are
3 hereby repealed.

1 SECTION 34. Section twenty-five of chapter two hundred
2 and eight of the General Laws is hereby repealed.

1 SECTION 35. Section 6A of chapter 210 of the General
2 Laws, as amended by chapter 274 of the acts of 1957, is

3 hereby amended by striking out in lines 10 through 12 the
4 words “provided, that if such person is of illegitimate birth,
5 the name, or names, of, and all other facts relating to his
6 natural parent, or parents, shall be omitted from such certifi-
7 cate.”

1 SECTION 36. Section 1 of chapter 229 of the General
2 Laws, as most recently amended by chapter 166 of the acts of
3 1961, is hereby further amended by adding after the first
4 paragraph the following paragraph:—

5 For the purposes of this section, children and issue born
6 out of wedlock shall have the same rights as children and
7 issue born in wedlock.

1 SECTION 37. Section 2B of chapter 229 of the General
2 Laws, as appearing in section 3 of chapter 427 of the acts of
3 1949, is hereby amended by adding after the first paragraph
4 the following paragraph:—

5 For the purposes of this section children and issue born out
6 of wedlock shall have the same rights as children and issue
7 born in wedlock.

1 SECTION 38. Section 34 of chapter 262 of the General
2 Laws, as most recently amended by section 5 of chapter 1050
3 of the acts of 1973, is hereby amended by striking out clause
4 eleven and inserting in place thereof the following clause:—

5 (11) For entering amendment of a record of birth of an out
6 of wedlock child whose paternity is subsequently determined
7 under chapter two hundred and seven, sections fifteen C or
8 fifteen D, fifty cents.

1 SECTION 39. Section 22 of chapter 272 of the General
2 Laws, as appearing in the Tercentenary Edition, is hereby
3 amended by striking out, in line 2, the word “illegitimate”
4 and inserting in place thereof the words: — out of wedlock.

1 SECTION 40. Section 1 of chapter 273 of the General
2 Laws, as most recently amended by chapter 762 of the acts of
3 1971, is hereby amended by inserting after the last sentence
4 the following sentence:— The word child or children as used
5 in this section shall include a child or children born out of
6 wedlock whose paternity has been determined under section
7 fifteen C of chapter two hundred and seven, or with respect
8 to whom an uncontested affidavit has been filed under section
9 fifteen D of said chapter.

1 SECTION 41. Sections eleven, twelve, twelve A, thirteen,
2 fourteen, fifteen, sixteen, seventeen, eighteen and nineteen of
3 chapter two hundred and seventy-three of the General Laws
4 are hereby repealed.

1 SECTION 42. If any provision of this Act or the applica-
2 tion thereof to any person or circumstance is held invalid, the
3 invalidity does not affect other provisions or applications of
4 the Act which can be given effect without the invalid provi-
5 sion or application, and to this end the provisions of this Act
6 are severable.

HOUSE (1975) No. 62

AN ACT ESTABLISHING A CIVIL PATERNITY ACTION AND PROHIBITING DISCRIMINATION AGAINST CHILDREN BORN OUT OF WEDLOCK.

*Be it enacted by the Senate and House of Representatives in
General Court assembled, and by the authority of the same, as
follows:*

1 SECTION 1. Chapter 207 of the General Laws is hereby
2 amended by striking out section 15 and inserting in place
3 thereof the following new sections: —

4 *Section 15A.* For the purpose of sections fifteen B and fif-
5 teen C of this chapter the term “born in wedlock” shall refer
6 to a child born during the period extending from the date of
7 the marriage to its termination by annulment or decree abso-
8 lute to three hundred days after its termination by death, re-
9 gardless of whether such marriage is subsequently declared
10 void. A child “born out of wedlock” refers to any child born
11 other than during said period.

12 *Section 15B.* Every child is the legitimate child of its
13 biological parents and the rights and duties existing between a
14 child and its parents shall be the same regardless of whether
15 said child was born in wedlock, except that the rights of a
16 father of an out-of-wedlock child with the respect to adoption
17 shall be governed by section four A of chapter two hundred
18 and ten and a child conceived by artificial insemination shall
19 have no rights against a donor who is not the husband of the
20 mother.

21 *Section 15C.* A proceeding to determine the paternity of a
22 child shall be a civil proceeding and the probate court shall
23 have jurisdiction of said proceeding. Paternity may be deter-
24 mined upon the petition of the child or its guardian, the
25 mother, a person alleging himself to be the father, or the pub-
26 lic authority supporting the child. Except as provided in chap-
27 ter one hundred and ninety, the proceedings shall be brought
28 in the county wherein the respondent resides, but if such res-
29 idence is outside Massachusetts or if respondent is a public
30 authority, the proceeding may be brought in the county
31 wherein the petitioner resides.

32 The court or the clerk or the register of probate may notify
33 the respondent to appear by the publication of such a form of
34 notice as it or he may require or by delivering to the respon-
35 dent an attested copy of the petition and a summons, or in
36 such other manner as it or he may require. If the respondent
37 does not appear and the court considers the notice defective
38 or insufficient, it may order further notice.

39 No law limiting adjournments or continuances shall apply
40 to proceedings under this section. On the request of any
41 party, a hearing shall be continued until after the birth, mis-
42 carriage or stillbirth of the child.

43 The proceeding shall be closed to the public, and all rec-
44 ords of the proceeding shall be sealed. The rules of evidence
45 and competency of witnesses shall be as in any other civil
46 proceeding in the probate court, and proof shall be by a pre-
47 ponderance of the evidence,

48 (1) where the child is born in wedlock, the child shall be
49 presumed to be the child of the mother's husband, and such
50 presumption may be rebutted only by clear and convincing
51 evidence;

52 (2) where the child is born out of wedlock:

53 (a) if the proceeding is heard after the death of the alleged
54 father, proof shall be by clear and convincing evidence, un-
55 less the father's estate is seeking to have his paternity af-
56 firmed, or

57 (b) If any person is seeking to set aside an unrebutted ack-
58 nowledgement of paternity as provided in section fifteen C of
59 this chapter, proof shall be by clear and convincing evidence.

60 In any proceeding under this section, the court may order
61 the mother, her child and the alleged father to submit to one
62 or more blood grouping tests, to be made by a duly qualified
63 physician or other duly qualified person, designated by the
64 court, to determine whether or not the alleged father is the
65 father of the child. If the blood tests exclude the alleged
66 father, the question of paternity shall be resolved accordingly
67 and an appropriate order shall be entered. Blood tests which
68 do not exclude the possibility of the putative father's pater-
69 nity shall be admissible in evidence at the court's discretion
70 along with evidence, if available, of the statistical probability
71 of paternity based on such tests. If one of the parties refuses
72 to comply with the order of the court relative to such tests, he
73 shall be guilty of civil contempt of court unless the court, for
74 good cause, otherwise orders. Unless the court otherwise or-
75 ders, the state shall bear the costs of all blood tests ordered
76 by the court pursuant to this section.

77 No criminal action, other than under section one of chapter
78 two hundred and sixty-eight (relating to perjury) may be
79 brought against the putative father or mother as a result of
80 any evidence given by them in a proceeding under this sec-

tion; provided, however, that a criminal action for nonsupport may be brought under section one of chapter two hundred and seventy-three if limited to offenses occurring subsequent to the determination of paternity.

If the court becomes satisfied that no living child will be born of which the putative father is the father, or that the paternity of the child has been determined, or that adequate provision has been made for its maintenance and that is for the best interest of the child, the case may be dismissed and any findings vacated; and if the court certifies that it is for the best interests of the child, no further action shall be maintained under this section.

At any time after a finding of paternity, the court may make an order for the payment of money to the mother or to a third party who will apply said money to the care and maintenance of the child.

The duty to contribute reasonably to the support of the child shall continue during its minority. The court may order the father to pay the reasonable expenses of the pregnancy and of the confinement of the mother, whether the child is born dead or alive. If the child has died, or if the child dies subsequently, the court may make an order for the payment of its funeral expenses, whether or not other relief is sought.

The court may also make such order as may be appropriate concerning the custody or visitation of the child, and from time to time may revise said order as justice and the welfare of the child require. As provided in section fifteen A of this chapter, the standard governing a determination of custody or visitation shall be the same as if the child were born in wedlock.

If a question of paternity arises in any other proceeding in the probate court, the rules set forth in this section shall apply with respect to the determination of paternity.

No action may be brought under this section once a final decree of adoption has been rendered with respect to such child.

Section 15D. Paternity may be acknowledged by the mother and father through affidavits filed with the clerk of the town where the child was born. If the father's affidavit does not accord with the affidavit filed by the mother or if the mother fails to file an affidavit prior to or contemporaneous with the father's affidavit, then the clerk shall give due notice of the father's affidavit to the mother, as provided in chapter forty-six, section thirteen. If she does not contest said affidavit within the time provided in said section thirteen, the child shall be considered the child of the alleged father, until a contrary determination of paternity is made upon clear and convincing evidence in a proceeding under section fifteen B of this chapter.

1 SECTION 2. Section 7 of chapter 4 of the General Laws,
2 as most recently amended by section 1 of chapter 1050 of the
3 acts of 1973, is hereby amended by striking out clause Sixteen
4 and inserting in place thereof the following clause: Sixteen,
5 “Issue,” as applied to the descent of estates shall include all
6 the lineal descendants of the ancestor, including children born
7 out of wedlock.

1 SECTION 3. Section 7 of chapter 4 of the General Laws is
2 hereby further amended by inserting after the fifth clause the
3 following clause: — Fifth A, “Children,” shall include chil-
4 dren born in and out of wedlock unless that statute expressly
5 excludes children born out of wedlock or is limited to chil-
6 dren born in wedlock.

1 SECTION 4. The fourth paragraph of section 12B of chap-
2 ter 32 of the General Laws, as appearing in section 2 of chap-
3 ter 793 of the acts of 1972, is hereby amended by inserting
4 after the word “member” in line 7 the words: — as well as a
5 child born out of wedlock.

1 SECTION 5. Subsection b of section 2 of chapter 32B of
2 the General Laws, as amended by section 1 of chapter 214 of
3 the acts of 1960, is hereby further amended by inserting after
4 the last sentence the following sentence: — The term “chil-
5 dren” shall include children born out of wedlock.

1 SECTION 6. The second paragraph of section 1 of chapter
2 46 of the General Laws, as most recently amended by chap-
3 ter 358 of the acts of 1968, is hereby further amended by strik-
4 ing out, in line 4, the word “illegitimate” and inserting in
5 place thereof the words: — out of wedlock.

1 SECTION 7. Section 2A of chapter 46 of the General
2 Laws, as most recently amended by chapter 10 of the acts of
3 1965, is hereby further amended by inserting after the word
4 “of” the first time it appears in line 1, the words: — all birth.

1 SECTION 8. Section 3 of chapter 46 of the General Laws,
2 as appearing in section 2 of chapter 358 of the acts of 1968, is
3 hereby amended by striking out, in line 9, the word “illegiti-
4 mate” and inserting in place thereof the words: — out of wed-
5 lock.

1 SECTION 9. Section 3 of chapter 46 of the General Laws
2 is hereby further amended by inserting after the word
3 “forth,” in line 10, the words: — except as provided in sec-
4 tion 13 of this chapter.

1 SECTION 10. The third sentence of the first paragraph
2 of section 3 of chapter 46 of the General Laws, as appearing
3 in section 2 of chapter 358 of the acts of 1968, is hereby re-
4 pealed.

1 SECTION 11. Section 13 of chapter 46 of the General
2 Laws, as most recently amended by chapter 266 of the acts of
3 1971, is hereby further amended by striking out paragraphs 2
4 and 3, and inserting in place thereof the following paragraphs:

5 Paragraph 2. In the case of an out of wedlock child whose
6 father was not previously or accurately recorded, upon the
7 determination of his paternity under section fifteen B of chap-
8 ter two hundred and seven or upon an uncontested acknowl-
9 edgement under section fifteen C of chapter two hundred and
10 seven, the record of his birth shall be amended, supplemented
11 or replaced as hereinafter provided so as to read in all re-
12 spects as if such person has been reported for records as born
13 to such parents in wedlock. For such purpose, the town clerk
14 shall receive a certified copy of a determination of paternity
15 under section fifteen B of chapter two hundred and seven.
16 The town clerk shall also receive written acknowledgement of
17 the child by the putative father in the form of an affidavit.
18 Unless the father's affidavit is accompanied or preceded by a
19 corroborating affidavit from the mother, the clerk shall give
20 notice to the father's affidavit to the mother. Failure of the
21 mother to contest said affidavit to the town clerk within thirty
22 days after receipt of notice shall cause the birth records of the
23 child to be amended, supplemented or replaced to reflect the
24 acknowledgement of paternity under section fifteen C of
25 chapter two hundred and seven. If, however, the birth of
26 such a child was recorded as that of a child of the mother and
27 the man who was her husband at the time of such birth, the
28 record shall not be amended or replaced as provided in this
29 section unless the fact of birth out of wedlock has been de-
30 termined by a proceeding under section fifteen B of chapter
31 two hundred and seven.

32 Paragraph 3. When the name of the father is amended,
33 supplemented or replaced as provided in the preceding para-
34 graph, the name of the child shall not be changed unless the
35 probate court determines that such change is in the child's
36 best interests.

1 SECTION 12. Section 24 of chapter 46 of the General
2 Laws, as appearing in section 7 of chapter 48 of the acts of
3 1960, is hereby amended by striking out, in line 3, the word
4 "illegitimate" and inserting in place thereof the words: — out
5 of wedlock.

1 SECTION 13. Section 24 of chapter 46 of the General
2 Laws is hereby further amended by striking out, in line 4, the
3 word "illegitimate" and inserting in place thereof the words:
4 — out of wedlock.

1 SECTION 14. Section 29 of chapter 114 of the General
2 Laws, as appearing in the Tercentenary Edition, is hereby
3 amended by inserting after the last sentence the following
4 sentence: — Children, within the meaning of this section,
5 shall also include children born out of wedlock.

1 SECTION 15. Subsection c of section 32 of chapter 152 of
2 the General Laws, as amended by section 2 of chapter 282 of
3 the acts of 1950, is hereby amended by inserting after the last
4 sentence the following sentence: — Children, within the
5 meaning of this subsection, shall also include children born
6 out of wedlock.

1 SECTION 16. Subsection d of section 32 of chapter 152 of
2 the General Laws, as most recently amended by section 3 of
3 chapter 282 of the acts of 1950, is hereby amended by insert-
4 ing after the last sentence the following sentence: — Chil-
5 dren, within the meaning of this subsection, shall also include
6 children born out of wedlock.

1 SECTION 17. The second paragraph of section 132A of
2 chapter 175 of the General Laws, as appearing in section 2 of
3 chapter 249 of the acts of 1951, is hereby amended by insert-
4 ing after the word "children" in line 14, the words: — includ-
5 ing children born out of wedlock.

1 SECTION 18. Section 1 of chapter 190 of the General
2 Laws, as most recently amended by section 1 of chapter 637
3 of the acts of 1970, is hereby amended by inserting after the
4 first paragraph the following paragraph: —

1 Paragraph 2. Issue and children, within the meaning of this
2 section, shall include issue and children born out of wedlock.

1 SECTION 19. Section 3 of chapter 190 of the General
2 Laws, as amended by chapter 149 of the acts of 1959, is
3 hereby amended by inserting after the first paragraph the fol-
4 lowing paragraph: —

5 Paragraph 2. Issue and children, within the meaning of this
6 section, shall include issue and children born out of wedlock.

1 SECTION 20. Sections five, six and seven of chapter one
2 hundred and ninety of the General Laws are hereby repealed.

1 SECTION 21. Section 20 of chapter 191 of the General
2 Laws, as amended by section 2 of chapter 479 of the acts of
3 1969, is hereby further amended by inserting after the last
4 sentence the following sentence: — Children, within the
5 meaning of this section, shall include children born out of
6 wedlock.

1 SECTION 22. Section 22 of chapter 191 of the General
2 Laws, as most recently amended by chapter 411 of the acts of
3 1971, is hereby amended by inserting after the word “chil-
4 dren” in line 6, the words: — and children born out of wed-
5 lock.

1 SECTION 23. Section 1 of chapter 196 of the General
2 Laws, as appearing in the Tercentenary Edition, is hereby
3 amended by inserting after the first paragraph the following
4 paragraph: —

5 Paragraph 2. The term “child” or “children” as used in
6 this chapter shall include a child or children born out of wed-
7 lock.

1 SECTION 24. Section 6 of chapter 207 of the General
2 Laws, as appearing in the Tercentenary Edition, is hereby
3 amended by striking out, in lines 12 and 13 the words “and
4 the issue of such subsequent marriage shall be considered as
5 the legitimate issue of both parents.”

1 SECTION 25. Sections fifteen, sixteen and seventeen of
2 chapter two hundred and seven of the General Laws are
3 hereby repealed.

1 SECTION 26. Section twenty-five of chapter two
2 hundred and eight of the General Laws is hereby repealed.

1 SECTION 27. Section 6A of chapter 210 of the General
2 Laws, as amended by chapter 274 of the acts of 1957, is
3 hereby amended by striking out in lines 11 through 14 the
4 words “provided, that if such person is of illegitimate birth,
5 the name, or names, of, and all other facts relating to his
6 natural parent, or parents, shall be omitted from such certifi-
7 cate.”

1 SECTION 28. Section 1 of chapter 229 of the General
2 Laws, as most recently amended by chapter 166 of the acts of
3 1961 is hereby further amended by adding after the first
4 paragraph the following paragraph: —

5 Paragraph 2. For the purposes of this section, children and
6 issue born out of wedlock shall have the same rights as chil-
7 dren and issue born in wedlock.

1 SECTION 29. Section 2B of chapter 229 of the General
2 Laws, as appearing in section 3 of chapter 427 of the acts of
3 1949, is hereby amended by adding after the first paragraph
4 the following paragraph: —

5 Paragraph 2. For the purposes of this section children and
6 issue born out of wedlock shall have the same rights as chil-
7 dren and issue born in wedlock.

1 SECTION 30. Section 34 of chapter 262 of the General
2 Laws, as most recently amended by section 5 of chapter 1050
3 of the acts of 1973, is hereby amended by striking out clause
4 eleven and inserting in place thereof the following clause: —

5 (11) For entering amendment of a record of birth of an out
6 of wedlock child whose paternity is subsequently determined
7 under chapter two hundred and seven, sections fifteen B or
8 fifteen C, fifty cents.

1 SECTION 31. Section 22 of chapter 272 of the General
2 Laws, as appearing in the Tercentenary Edition, is hereby
3 amended by striking out, in line 2, the word “illegitimate”
4 and inserting in place thereof the words: — out of wedlock.

1 SECTION 32. Section 1 of chapter 273 of the General
2 Laws, as most recently amended by chapter 762 of the acts of
3 1971, is hereby amended by inserting after the last sentence
4 the following sentence: — The word child or children as used
5 in this section shall include a child or children born out of
6 wedlock whose paternity has been determined under section
7 fifteen B of chapter two hundred and seven, or with respect
8 to whom an uncontested affidavit has been filed under section
9 fifteen C of said chapter.

1 SECTION 33. Sections eleven, twelve, twelve A, thirteen,
2 fourteen, fifteen, sixteen, seventeen, eighteen and nineteen of
3 chapter one hundred and seventy-three of the General Laws
4 are hereby repealed.

HOUSE (1975) No. 4449

AN ACT TO AMEND THE LAWS PERTAINING TO CERTAIN CHILDREN.

*Be it enacted by the Senate and House of Representatives in
General Court assembled, and by the authority of the same, as
follows:*

1 Chapter 273 of the General Laws is hereby amended by
2 adding the following section: —

3 10A: Every child, whether or not born in wedlock, is the

4 legitimate child of its natural parents and is entitled to all
5 rights and privileges as if born in lawful wedlock. The term
6 "natural parents" shall mean the child's mother and the
7 child's father if (a) the father is or has been married to the
8 mother and child is born during marriage or within ten
9 months after divorce (b) the mother and father have been
10 married, though marriage has been declared void; (c) the
11 father acknowledges child in writing filed with and approved
12 by the probate court; (d) the father receives the child into his
13 family or lives with child or does other such acts indicating
14 paternity (e) the father and mother marry after birth of child;
15 (f) the father consented to artificial insemination; (g) the
16 father is adjudicated father of the child by a court or by other
17 competent jurisdiction.

18 Section 11 of chapter 273 of the General Laws is hereby
19 repealed and the following is inserted in place thereof: —

20 *Section 11.* A proceeding to determine the paternity of a
21 child shall be a civil proceeding and the district court shall
22 have jurisdiction of said proceeding. A proceeding to deter-
23 mine paternity may be brought in the district court sitting for
24 the county where the alleged father lives or in the county
25 where the mother lives. Paternity may be determined upon
26 the petition of the mother, the father, or any guardian of the
27 child. If a proceeding to determine paternity is commenced
28 during the pregnancy of the mother, the trial shall not, with-
29 out the alleged father's consent, be held until after the birth,
30 miscarriage, or stillbirth of the child, or until the mother is at
31 least six months pregnant. The rules of evidence and compe-
32 tency of witnesses in said proceeding shall be as in any other
33 civil proceeding and in the event an adjudication of paternity
34 is made, the alleged father may appeal therefrom as from any
35 other civil proceeding in the district court, provided, how-
36 ever, that the alleged father, if he so desires, may request a
37 trial de novo before a jury on the superior court or district
38 court, if jury sittings are available on said district court.

39 Section 12 of chapter 273 of the General Laws is hereby
40 repealed.

41 Section 15 of chapter 273 of the General Laws is hereby
42 repealed.

43 Section 16 of chapter 273 of the General Laws is hereby
44 amended by striking the words "or after conviction" and
45 substituting in place thereof the words, "or after an adjudica-
46 tion of paternity" and by striking the words "original com-
47 plaint or indictment" and substituting in place thereof "origi-
48 nal cause of action," and by striking the words "penalties
49 and."

50 Section 19 of chapter 273 of the General Laws is hereby
51 repealed.

52 Section 7 of chapter 4 of the General Laws is hereby
53 amended by striking the sixteenth clause thereof and inserting
54 in place thereof the following: "Issue" — sixteenth, "Issue,"
55 as applied to the descent of estates, shall include all the law-
56 ful lineal descendants of the ancestor, including children born
57 out of wedlock.

58 Section 7 of chapter 4 of the General Laws is hereby
59 amended by adding between the fifth and sixth paragraphs
60 thereof, the following words: "Children" — Fifth (A),
61 "Children" shall include every child, whether born in or out
62 of wedlock."

63 Section 1, subsection (3) of chapter 152 of the General
64 Laws is hereby amended by adding after the words "mem-
65 bers of the employee's family" the words "including children
66 born out of wedlock."

67 Section 32, subsection (c) of chapter 152 of the General
68 Laws is hereby amended by adding after the words "Upon
69 the parent with whom they are living at the time of the death
70 of such parent" the words "including their children born out
71 of wedlock."

72 Section 32, subsection (d) of chapter 152 of the General
73 Laws is hereby amended by adding after the words "any
74 children of the deceased employee conceived but not born at
75 the time of the employee's injury," the words "including the
76 natural children of the mother, and the natural children of the
77 father if (a) the father is or has been married to the mother
78 and the child is born during the marriage or within ten months
79 after divorce; (b) the mother and father have been married,
80 though the marriage has been declared void; (c) the father has
81 acknowledged the child in writing filed with and approved by
82 the probate court; (d) the father has received the child into his
83 family or lives with the child or does other such acts indicat-
84 ing paternity; (e) the father consented to artificial insemina-
85 tion; (f) the father is adjudicated the father of the child by a
86 court or other competent jurisdiction."

87 Section 7 of chapter 190 of the General Laws is hereby
88 amended by striking the entire section and substituting in
89 place thereof the following: — Every child shall, inherit from
90 its natural parents and from their kindred heir, lineal and col-
91 lateral, in the same manner of a child born in lawful wedlock.

92 Section 5 of chapter 190 of the General Laws is hereby re-
93 pealed.

94 Section 6 of chapter 190 of the General Laws is hereby
95 amended by striking the entire section and substituting in
96 place thereof the following: — If a child born out of wedlock,
97 who has not been acknowledged or adopted by the father dies
98 intestate without lawful issue who may lawfully inherit his es-
99 tate, his estate goes to his mother, or in the case of her de-
100 cease, to her heirs at law.

101 Section 20 of chapter 191 of the General Laws is hereby
102 amended by inserting at the end of said section, the following:
103 — For the purposes of this section, the word “children” shall
104 include all children whether or not born in lawful wedlock,
105 except if such child has been adopted in which case section 7
106 of chapter 210 shall control.

107 Section 22 of chapter 191 of the General Laws is hereby
108 amended by striking the period at the end of the section and
109 inserting in place thereof the following: — “and children born
110 out of wedlock.”

111 Section 6 of chapter 207 of the General Laws is hereby
112 amended by striking the last seventeen words of the section
113 beginning with “and” and ending with “parents” and by de-
114 letting the comma following the word “impediment” and re-
115 placing same with a period.

116 Section 15 of chapter 207 of the General Laws is hereby
117 repealed.

118 Section 17 of chapter 207 of the General Laws is hereby
119 repealed.

120 Section 2 of chapter 210 of the General Laws is hereby
121 amended by striking the fourth clause and substituting in
122 place thereof the following: “of the mother only of the child,
123 if born out of wedlock,” and by adding at the end of the sec-
124 tion the following: “In the case of a child born out of wed-
125 lock, the father of the child shall be notified of the surrender
126 or release of the child for adoption, or the intention to sur-
127 render or release said child, if (a) the father is or has been
128 married to the mother and the child is born during marriage or
129 within ten months after divorce; (b) the mother and father
130 have been married, though their marriage has been declared
131 void; (c) the father acknowledges the child in writing filed
132 with and approved by the probate court; (d) the father re-
133 ceives the child into his family or lives with the child or does
134 other such acts indicating paternity; (3) the marriage of father
135 and mother has occurred after birth of child; (f) the father
136 consented to artificial insemination; (g) the father is adjudi-
137 cated the father of the child by court or by competent juris-
138 diction, within 30 days after the birth of the child if the child
139 is surrendered or released for adoption at birth or within 30
140 days after receipt of such notice of surrender or release, said
141 father may petition the Probate Court for the County where
142 the child or the mother resides and request a hearing as to
143 whether it is in the best interests of the child for said child to
144 be surrendered or released for adoption; after a hearing, the
145 judge may take whatever action is indicated to further the
146 best interests of the child.

147 Section 6A of chapter 210 of the General Laws is hereby
148 amended by striking the last clause of the first paragraph and
149 substituting in place thereof, “provided that if such person is

150 born out of wedlock, the name, or names of and all other
151 facts relating to his natural parent, or parents, shall be omit-
152 ted from such certificate.

HOUSE (1975) No. 2726

AN ACT DELETING THE TERM "ILLEGITIMACY" FROM CERTAIN STATUTES.

*Be it enacted by the Senate and House of Representatives in
General Court assembled, and by the authority of the same, as
follows:*

1 SECTION 1. Section 11 of chapter 273 of the General
2 Laws, as appearing in the Tercentenary Edition, is hereby
3 amended by striking out, in line 5, the words "illegitimate
4 child" and by inserting in place thereof the following words:
5 — child born to single parents.

1 SECTION 2. Section 15 of said chapter 273, as appearing
2 in the Tercentenary Edition, is hereby amended by striking
3 out, in line 1, the words "an illegitimate child" and inserting
4 in place thereof the following words: — a child born to single
5 parents.

1 SECTION 3. Section 19 of said chapter 273, as appearing
2 in the Tercentenary Edition, is hereby amended by striking
3 out, in line 2, the words "illegitimacy proceedings" and in-
4 serting in place thereof the following words: — proceedings
5 including a child born to single parents.

I Introduction

The four bills reprinted above deal with certain aspects of the question of illegitimate children. Some are designed to effectuate a wholesale change in the laws regarding illegitimacy. Others merely attempt to clarify existing law. Several of the bills overlap and what is said of one bill may also apply to others.

II Issue of a Void Marriage

S. 928 and H. 62 provide for the repeal of section 15 of Chapter 207 of the General Laws and propose identical sections to replace it. Both bills would eliminate the illegitimacy of the issue of a marriage which is void because of consanguinity or affinity. Instead, every child would be the legitimate issue of its "biological parents," and the question of whether the child was born in lawful wedlock is immaterial for the purpose of determining legitimacy. In its 48th report at 177 (1972), the Judicial Council stated that "(s)ection 15 finds a basis in public policy which is difficult to change." However, a policy which makes illegitimate the issue of a marriage between persons of specified affinity is questionable. G.L. c. 272, §17 punishes a person who enters into such a marriage by imprisonment in a state prison for not more than 20 years or in a jail for not more than 2½ years. Neither S. 928 nor H. 62 legalizes or liberalizes such marriages. The penalties for such marriages remain intact. However, the stigma of illegitimacy for the issue of such marriages would be removed.

In *Sutton v. Warren*, 51 Mass. 451, 452 (10 Metc. 1845), the Supreme Judicial Court stated "that such marriages are against the law of God, are immoral and disruptive of the purity and happiness of domestic life." Clearly, the policy of this Commonwealth is to prohibit and punish marriages between certain relatives. It is to be questioned whether this policy should extend to the punishment of the innocent issue of such a marriage.

III A Civil Proceeding to Determine Paternity

Both S. 928 and H. 62 would make a determination of paternity a civil proceeding with the probate court having jurisdiction. A threshold problem presented by this proposal is the proof necessary for an adjudication of paternity. Under a civil proceeding, paternity would have to be established by a preponderance of the evidence and both bills specifically provide for such a standard of proof, except in certain situations.

The fears attendant upon making an adjudication of paternity a civil proceeding were expressed by the Judicial Council in its 48th Report at 173 (1972):

There are times when more than one individual can be, at least, suspected of 'getting a woman with child' . . .

It may be wise to make it more simple to achieve legitimacy status when there is the full consent of the parents or where only a legal technicality interferes. It is quite some-

thing else to relax the standards of proof to the detriment of a person who merely had an opportunity (along with others) especially in these times when promiscuous sex relations are a by-product of a permissive society.

Doubtless, the concerns we expressed in 1972 are still valid today. However, the Supreme Judicial Court has recently indicated that a change in the Commonwealth's paternity statutes should be considered.

In *Commonwealth v. MacKenzie*, 1975 Adv Sh. 2827, 2835 n. 5, 334 N.E. 2d 613, 616 n. 5 (1975), the court stated:

Any proceeding under § 11 (of Chapter 273) should be treated in all respects as a criminal proceeding, just as a non-support proceeding is under G.L. ch. 273, § 15. For example, paternity must be established beyond a reasonable doubt and the alleged father may not be compelled to testify. In light of this opinion, the legislature may wish to review all of the Commonwealth's paternity statutes and to consider whether determinations of paternity should be made in the context of a criminal proceeding.

While the court in *MacKenzie* appears to have given its approval to a civil adjudication of paternity, the doubts and fears which the Judicial Council anticipated in 1972 are still present. Even where no criminal sanctions are imposed upon the putative father, a long term duty of support is involved. Thus, serious consideration should be given to the proposal to convert paternity proceedings to a civil context where a preponderance of the evidence could subject the alleged father to the burden of supporting a child during its minority.

Both S. 928 and H. 62 attempt to decriminalize paternity determinations. S. 928 provides that "(n)o criminal action (other than perjury) may be brought against the putative father or mother as a result of any evidence given by them in a proceeding under this section . . ." (emphasis supplied). H. 62 contains an identical provision. Both bills would expressly repeal the criminal statutes in Chapter 273. It should be noted that H. 62 refers to Chapter 173. This is obviously a typographical error. The attempt to decriminalize paternity proceeding appears to be in accord with the recent Supreme Judicial Court decision in *Commonwealth v. MacKenzie*, 334 N.E. 2d 613 (1975). In *MacKenzie*, the defendant was charged under Chapter 273, § 11 for "getting a woman

with child.” The defendant claimed that the criminal sanctions of § 11 violated the equal protection clause of the 14th amendment since the mother of the illegitimate child was not similarly punished. The court accepted this contention and stated that “. . . we discern no permissible legislative goal which ultimately is achieved by making a father, but not a mother, guilty of conceiving a child out of wedlock.”

IV Blood Tests

Another problem raised by both S. 928 and H. 62 is the blood group exclusion provision. Both bills provide that the court may order blood tests of the mother, child, and alleged father. A blood grouping exclusion test which positively excludes an alleged father would be conclusive on the issue of paternity. *See: Commonwealth v. D'Avella*, 339 Mass. 642 (1959). Under G.L. c. 273, § 12A, blood tests which do not exclude the defendant are not admissible. However, S. 928 and H. 62 specifically provide that blood tests which do not exclude the alleged father may be admitted into evidence together with statistical probabilities of exclusion.

This portion of the proposed bills may be subject to serious criticism. A blood test which does not exclude the alleged father but which is allowed into evidence may be highly prejudicial. *See: McDermott, Evidence 1 Annual Survey of Mass. Law*, 267, 269 (1954). While blood tests can disprove paternity, they cannot prove it. *See: Lombard, 1 Mass. Prac. Series*, §§ 691, 700.

The few cases which have dealt with the issue of the admissibility of blood tests which do not exclude paternity have held that the results of the tests are inadmissible. In *Flippen v. Meinhold*, 282 N.Y.S. 444, 156 Misc. 45 (1935), the New York Court of Appeals stated its position:

“If the test shows a negative result, it would seem to be conclusive proof of non-paternity, but the positive would simply indicate the possibility of paternity. It would be improper to draw an inference of paternity where merely the possibility is shown . . .”

See also, State ex rel. Freeman v. Morris, 102 N.E. 2d 450 (Ohio, 1951).

The impression which medical evidence would have on a jury is clear. The fact that a blood test is consistent with paternity may

only be coincidental, but a jury hearing expert testimony might accord such testimony an unwarranted amount of weight in deciding the guilt of the defendant. Such a fear was expressed by the Michigan Supreme Court in *People v. Nichols*, 341 Mich. 311, 67 N.W. 2d 230 (1954). In *Nichols*, the defendant was charged in a criminal paternity suit and the state attempted to put into evidence blood tests which did not exclude the defendant. The court refused to allow the results into evidence since

(t)he possible psychological effect on the minds of the jurors cannot be ignored. The use of scientific apparatus and tests and expert testimony as to scientific results, placed before the jury . . . could not have failed to mislead the jurors into believing that this totally irrelevant evidence might be considered as having probative value.

But see the dissent in *People v. Nichols* in which it is pointed out that the defendant had been dating the prosecutrix, had had "access" and that the blood tests would be a circumstance to be considered with all the other evidence. See also *Carpenter v. Goodall*, 144 Ind. App. 134, 244 N.E. 2d 673 (1962) (blood tests did not exclude defendant but trial judge saw the results. On appeal, held that the defendant had not been prejudiced by the judge seeing the tests results).

Another point raised by both S. 928 and H. 62 is the provision whereby a person refusing to submit to a blood test may be held in contempt. At common law, a court's powers to order a physical examination of civil litigants was very narrowly circumscribed. See *Union Pacific R. Co. v. Botsford*, 141 U.S. 250 (1891). In the *Botsford* case the plaintiff sued the defendant for personal injuries and upon a motion by the defendant the trial judge ordered the plaintiff to submit to a physical examination. The United States Supreme Court stated

No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

In *Botsford* there was no state or federal statute on point and, therefore, the order of the trial judge was reversed.

Less than a decade after the decision in *Botsford*, the Supreme Court once again confronted the question of physical examinations in civil proceedings. In *Camden & Suburban R. Co. v.*

Stetson, 177 U.S. 172 (1900), a New Jersey statute authorized the court to order a physical examination of the parties to a civil suit. The Supreme Court in *Camden* upheld the physical examination order and indicated that a statute authorizing a judge to make such an order would not contravene the federal constitution. See also, *Stack v. New York, N.H. & H. R. Co.*, 177 Mass. 155, 159, 58 N.E. 686 (1900) (court does not have inherent power to order physical examination in civil suit, but legislature may grant such power). Thus, it would appear that the provision in both S. 928 and H. 62, authorizing the probate court to hold a person in contempt for failure to comply with an order for a blood test would be constitutional. Furthermore, *Mass. R. Civ. P.* 35 presently provides that

When the mental or physical condition (including the blood group) of a party, . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician . . .

It should be noted that S. 928 and H. 62 would repeal the present blood grouping exclusion statute, Chapter 273, section 12A.

As an alternative to a paternity adjudication, S. 928 and H. 62 would provide that a putative father may acknowledge, without marriage, the paternity of a child born out of wedlock. This would not affect the legitimacy of the child since under the proposed bills, every child would be the legitimate issue of its biological parents. However, the bills would obviate the necessity of an adjudication of paternity unless the acknowledgment is challenged. Under existing law a mere acknowledgment without marriage is insufficient to confer legitimate status.

V Testate Succession

S. 928, H. 62 and H. 4449 redefine the words "issue" in Chapter 4, § 7 and add a definition of the word "children" to § 7. "Issue" would include children born out of wedlock as well as those born in lawful wedlock, unless a specific statute expressly draws a distinction. In 1972 the Judicial Council at page 174 posited that if such a change were made "(w)ills, trusts, and other documents now drafted, and those in the future, might have to be drawn to exclude possible beneficiaries not intended by the third party to take any share." The Judicial Council concluded by stating that "(t)he change in the definition of 'children' and 'issue'

would have a radical effect.” This “radical effect” would be felt most acutely in situations in which a will or other document had been made and executed before the change in the law. The fundamental principle in the interpretation of a will is the intent of the testator. Such intent is determined by the language of the instrument itself and the circumstances known to the testator at the time of the execution of the will. *See: Putnam v. Putnam*, 316 N.E. 2d 729 (1974). If a testator used the word “issue” or “children” in his will knowing the definitions given to those words and intending to exclude an illegitimate child, what effect would the changes contained in the proposed bills have? One possibility is that the law in existence at the time of the execution of the will should control. However, the other side of the argument is that the testator knew of the changes in the law (or is presumed to know them) and his failure to change his will indicates an intent to include his illegitimate child. Naturally, each case turns on its facts but it would seem that the enactment of any of these bills would necessitate much redrafting of early wills.

Mass. Gen. Laws Ann. ch. 191, §20 deals with the question of children or the issue of deceased children of the decedent who are omitted from a will. Section 20 provides that if a testator unintentionally omits a child or the issue of a deceased child, such child or children will take a share as if the testator had died intestate. The Massachusetts Supreme Judicial Court has spoken, on several occasions, as to whether the statute includes illegitimate children. The court has consistently held that an illegitimate child does not enjoy the coverage of Ch. 191, §20. *See: Fiduciary Trust Co. v. Mishou*, 321 Mass. 615, 75 N.E. 2d 75 (1947); *Town of Plymouth v. Hey*, 285 Mass. 357, 189 N.E. 100 (1934); *Kent v. Barker*, 68 Mass. 535, (2 Gray 1854).

Both H. 62 and S. 928 would specifically provide that children born out of wedlock would come within the reach of Chapter 191, § 20 as well as Chapter 191, § 22 (anti-lapse statute). The anti-lapse statute, as amended by St. 1971, c. 411, now provides that the words “child” “issue” and “relative” as used in section 22 shall include adopted children.

VI Adoption By Father

Senate 928 would amend Chapter 210, § 4 of the General Laws by providing that when a mother surrenders her child for adoption, notice must be given to any person who has filed a “Paternity Responsibility Claim” with the Department of Public Wel-

fare. The person who has filed such a claim is allowed an opportunity to petition (within 30 days) for adoption. As far as the hearing on the petition of adoption is concerned the petition of the person claiming to be the father is given preference. Senate 928 provides that the petition of the person claiming to be the father *will* be allowed “without regard to other potential adoptive parents” if the court 1) has reasonable grounds to believe that the person is in fact the father of the child and 2) it is in the best interests of the child. Thus, it would appear from the language of the bill that an unwed father who petitions for the adoption of his child who has been surrendered, would not have to show that he would be better for the child than the other potential parents. Of course, he would still have to establish that adoption by him would be in the best interests of the child.

This portion of Senate 928 appears to be an attempt to comply with the recent United States Supreme Court decision in *Stanley v. Illinois*, 405 U.S. 645 (1972). In *Stanley* a state statute which failed to provide for notice to an unwed father in adoption proceedings was invalidated on due process grounds.

VII Summary of Proposed Changes

In addition to the provisions already discussed, H. 62 would also amend or modify many other statutes:

- 1) H. 62 would amend paragraph 4 of § 12B of Chapter 32 relative to retirement and pension allowances to public employees. The amendment provides that allowances to an employee's children would include children born out of wedlock.
- 2) § 2(b) of Chapter 32B relative to the availability of group insurance to Civil Service employees and their dependents would be amended by H. 62 by providing that a child born out of wedlock would be considered a dependent for the purposes of Civil Service Group Insurance coverage.
- 3) § 1 of Chapter 46 would be amended. This statute pertains to the keeping of records of births, deaths, and marriages. The amendment would delete the word “illegitimate” wherever it appeared in the statute and replace it with the words “born out of wedlock.” This amendment would be consistent with the overall purpose of the bill since it is intended that no person shall be deemed illegitimate.

- 4) § 3 of Chapter 46 relative to physicians' records of births is amended by striking the word "illegitimate" and replacing it with the words "out of wedlock."
- 5) § 24 of Chapter 46 relative to statements of births and deaths by a town is amended by striking the word "illegitimate" and replacing it with the words "out of wedlock."
- 6) § 29 of Chapter 114 relative to the possession of cemetery lots by a deceased's widow and children after the death of the deceased is amended. Children within the meaning of this statute would include children born out of wedlock.
- 7) §§ 32(c) & (d) of Chapter 152 relative to persons who are dependent upon an employee for the purposes of workmen's compensation would be amended. Dependents within the meaning of this statute would include children born out of wedlock. In its 48th Report at 175, the Judicial Council approved of such an amendment.
- 8) § 132A of Chapter 175 relative to Group Annuity contracts is amended. Children within the meaning of the statute would include children born out of wedlock.
- 9) § 3 of Chapter 190 relative to the descent of land in the absence of a will is amended. Issue and Children within the meaning of the statute would now include children born out of wedlock.
- 10) § 1 of Chapter 190 relative to a spouse's share of property not disposed by will would be amended. Issue and children within the meaning of the statute would include children born out of wedlock.
- 11) § 5 of Chapter 190 relative to an illegitimate child being the issue of its mother and taking from her would be repealed.
- 12) § 6 of Chapter 190 relative to the descent of the estate of an illegitimate child would be repealed.
- 13) § 7 of Chapter 190 relative to the legitimation of a child by the marriage and acknowledgement of its parent would be repealed.
- 14) § 20 of Chapter 191 relative to the omission of a child from the will of the testator would be amended. Children within the meaning of the statute would include children born out of wedlock.
- 15) § 22 of Chapter 191 (The Anti-Lapse Statute) would be amended. Children within the meaning of the statute would

include children born out of wedlock.

- 16) § 1 of Chapter 196 relative to allowances to widows and children for apparel and rent-free housing would be amended. Children within the meaning of the statute would include children born out of wedlock.
- 17) § 6 of Chapter 207 relative to the validity of a marriage entered into during the existence of a former marriage. The sentence in this statute whereby the issue of the subsequent marriage is legitimate after the impediment of the first marriage is removed, is deleted. This accords with the overall purpose of the bill, since no person would be illegitimate.
- 18) § 15 of Chapter 207 relative to the issue of a marriage between persons of certain degrees of consanguinity or affinity would be repealed.
- 19) § 16 of Chapter 207 relative to the issue of a void marriage because of nonage or insanity would be repealed.
- 20) § 17 of Chapter 207 relative to the issue of a marriage void because of the existence of a prior marriage would be repealed.
- 21) § 25 of Chapter 208 relative to the legitimacy of the issue of a marriage which is dissolved by reason of the adultery of the wife would be repealed.
- 22) § 6A of Chapter 210 relative to certificates of adoption would be amended by deleting the reference to the omission of the child's illegitimate status on the certificate as unnecessary.
- 23) § 1 of Chapter 229 relative to persons entitled to damages for death from defective ways is amended. Children within the meaning of the statute would include children born out of wedlock.
- 24) § 2B of Chapter 229 relative to persons entitled to damages for the death of an employee as a result of the negligence of the employer would be amended. Children born out of wedlock would have the same rights as children born in wedlock.
- 25) § 34(11) of Chapter 262 relative to fees for changing records of illegitimate children would be amended by deleting the word illegitimate and replacing it with the words "out of wedlock."
- 26) § 22 of Chapter 272 relative to the concealment of the death of an illegitimate child would be amended by deleting the word illegitimate and replacing it with the words "out of wed-

lock.”

- 27) § 1 of Chapter 273 relative to the desertion and non-support of a wife and minor children would be amended. Children within the meaning of the statute would include a child born out of wedlock whose parents have been determined or whose paternity has been acknowledged and not rebutted.
- 28) § 11 of Chapter 273 relative to the crime of getting a woman with child would be repealed.
- 29) § 12 of Chapter 273 relative to an adjudication of paternity would be repealed.
- 30) § 12A of Chapter 273 relative to the performance of blood tests in paternity actions would be repealed.
- 31) § 13 of Chapter 273 relative to continuances and the expenses of pregnancy would be repealed.
- 32) § 14 of Chapter 273 relative to the court's powers to make any order relative to the care and custody of the child would be repealed.
- 33) § 15 of Chapter 273 relative to the crime of non-support would be repealed.
- 34) § 16 of Chapter 273 relative to the penalties imposed for violation of sections 1 to 10 of Chapter 273 would be repealed.
- 35) § 17 of Chapter 273 relative to the court's authority to grant a dismissal or to vacate the judgment would be repealed.
- 36) § 18 of Chapter 273 relative to the use of money which has been forfeited for the support of the child would be repealed.
- 37) § 19 of Chapter 273 relative to the bar against proceedings commenced before July 1, 1913 would be repealed.

VIII House Bill 4449

House 4449 is identical to House Bill 2310 of 1972 which the Judicial Council studied in its 48th report. H. 4449 provides that every child is the legitimate child of its “natural parents.” The “natural parents” are the father and mother if:

- a) a child born after marriage or within ten months after divorce;
- b) the marriage of the father and mother has been declared void;
- c) the father acknowledges the child in writing without marriage;
- d) the father receives the child into the home and does such acts indicating paternity;
- e) the father and mother marry after the birth of the child;

- f) the father consented to artificial insemination;
- g) the father is adjudicated the father of the child by the court or by other competent jurisdiction.

It is questionable whether all of these definitions are really necessary. S. 928 and H. 62 provide two ways of establishing paternity. First an adjudication by a court and secondly, by an acknowledgement by the father. In its 48th report the Judicial Council would not recommend (d) above, nor would it accept an adjudication of paternity "by other competent jurisdiction."

The major defect in H. 4449 appears to be the attempt to define "natural parents." It is likely that this will lead to much confusion. Under H. 4449 there are seven ways to determine the natural parents of a child born out of wedlock. Clearly, the surest way to determine paternity is by an adjudication by a court. In the alternative, if a person acknowledges the paternity of a child, this should be sufficient unless it is rebutted. The fact that a man takes a child into his home and treats him like his child is not determinative of parenthood.

IX House Bill 2726

H. 2726 is merely designed to strike the term "illegitimate" or "illegitimacy" from §§ 11, 15, and 19 of Chapter 273. The term illegitimate would be replaced with the words "a child born to single parents." Clearly, H. 2726 does not make any substantive change in the Commonwealth's paternity statutes. Nor is the law with respect to illegitimacy altered.

X Recommendations of the Judicial Council

While we do not endorse any particular bill, we support the general principle that children born out of wedlock should have the same rights as all other children. We do not make a recommendation of any specific bill, since there are provisions in all of the proposals which are unacceptable. Nevertheless, we endorse the attempt to eliminate unequal treatment of children born out of wedlock.

Both S. 928 and H. 62 are well drafted and contain few ambiguities or conflicts. Both bills attempt a major re-working of the state's illegitimacy statutes, and they do so by making existing statutes consistent with the basic premise that all children are born legitimate.

H. 4449 suffers from the same deficiencies which we pointed out in our 48th report. H. 2726 is of limited use as an effort to reform and modernize our laws on legitimacy.

(B) RIGHTS OF ELDERLY PERSONS — APPOINTMENT OF CONSERVATORS

HOUSE (1975) No. 1520

AN ACT PROVIDING FOR THE APPOINTMENT OF CONSERVATORS FOR CERTAIN ELDERLY PERSONS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Section 1 of chapter 201 of the General
2 Laws, as most recently amended by section 1 of chapter
3 314 of the acts of 1956, is hereby further amended by
4 adding at the end the following sentence: — The probate
5 court may also appoint pursuant to section sixteen B
6 conservators of elderly persons who reside in the county
7 and who, although able to properly care for their prop-
8 erty, request such an appointment.

1 SECTION 2. Chapter 201 of the General Laws is
2 hereby amended by inserting after section 16A the fol-
3 lowing section: —

4 *Section 16B.* If an elderly person petitions the probate
5 court and requests that a conservator be appointed to
6 care for his property and if, after such notice as the
7 court may require and after hearing, the court finds that
8 the elderly person is not physically or mentally incap-
9 able to properly care for his own property but that the
10 appointment of a conservator would be in the best in-
11 terests of the elderly person, the probate court may ap-
12 point such a conservator. All the provisions of this
13 chapter applicable to conservators appointed under the
14 provisions of section sixteen shall be equally applicable
15 to conservators appointed under the provisions of this
16 section.

Conservators of Elderly Persons

We oppose House (1975) 1520 which would make a significant change in the statute relative to the appointment of a conservator.

G.L. Chapter 201 § 1, as most recently amended by § 2 of Chapter 845 of the Acts of 1974, reads as follows:

§ 1. Probate court; power over appointments

The probate court may, if it appears necessary or convenient, appoint guardians of minors, mentally ill persons, mentally retarded persons and spendthrifts and conservators of the property of persons by reason of advanced age, mental weakness or mental retardation or physical incapacity unable to properly care for their property, who are inhabitants of or residents in the county or who reside out of the commonwealth and have estate within the county.

Amended by St. 1974, c. 845, § 2.

For the purposes of this chapter, a mentally retarded person is a person who, as a result of inadequately developed or impaired intelligence, is substantially limited in his ability to learn or adapt, as determined in accordance with established standards for the evaluation of a person's ability to function in society.

Amended by St. 1974, c. 845, § 2.

The appointment of conservators for elderly persons is a procedure which has been in effect since early colonial times. It is not necessary that an elderly person be mentally ill in order that the conservator be appointed. An elderly person may have a conservator, even against his or her will, provided that physicians who have personally examined the elderly persons certify that such persons are "unable to properly care for their property." It is not sufficient that a person merely reach a certain age to justify the appointment of a conservator under our present law. The proposed change would permit the appointment of a conservator "in the best interest" of an elderly person. It is true that the proposed statute requires the elderly person to request such an appointment, but we are not convinced that such "requests" will truly reflect the informed consent of the older person who by the very nature of age itself is subject to weakness of physical and mental faculties which were once strong. Older persons are particularly subject to pressures which could be resisted by a younger person.

We believe that the existing limitations are necessary. A person who is able to properly care for his or her property should not have a conservator, and a competent physician, after personal examination, should make the judgment as to this ability or lack of

it. The law now protects the elderly person. We would not like to see this protection diluted or removed.

The recent change introduced by § 16B of Chapter 201 permitting conservators for mentally retarded persons specifically requires a finding by professionals that such person "is incapable of making informed decisions with respect to the conduct of his financial affairs, and that the failure to appoint a conservator would create unreasonable risk to his property . . ."

It can be said that here again in the most recent enactment by the General Court in 1974 (Ch. 845 §9 of the Acts of 1974) the principle is carefully preserved that no conservator should be appointed if the individual has sufficient ability to care for his own affairs.

The proposed legislation is unwise.

(C) PUBLIC CONSERVATORS

HOUSE (1975) No. 1940

AN ACT PROVIDING FOR PUBLIC CONSERVATORS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 The General Laws are hereby amended by inserting after
2 chapter 194 the following new chapter: —

3 CHAPTER 194A

4 PUBLIC CONSERVATORS

5 *Section 1.* There shall be in each county one or more public
6 conservator, not exceeding six each in Middlesex and in Suf-
7 folk and five in any other county, appointed by the governor,
8 who shall hold office for five years from the time of their
9 appointment.

10 *Section 2.* A public conservator shall give bond for the
11 faithful performance of each estate as to which he is ap-
12 pointed conservator with sufficient sureties or without
13 sureties and in such form as the probate court may order,
14 payable to the commonwealth with conditions substantially as
15 required for a bond of a conservator under section nineteen of
16 chapter two hundred one.

17 *Section 3.* A public conservator shall petition the probate
18 court for appointment as conservator of any person who by
19 reason of advanced age, mental weakness, or physical in-

capacity is unable to properly care for his property and who has no known husband, widow, heirs apparent or presumptive or friend living in the commonwealth at the time of filing the petition who is capable to properly care for the property of such person.

Section 4. Upon the filing of such petition the court shall appoint a time and place for a hearing, and shall cause not less than seven days' notice thereof to be given to the person for whom a conservator is to be appointed, except that the court may for cause shown direct that a shorter notice be given. If the court finds that the welfare of the person requires the immediate appointment of a public conservator, such appointment may be made without notice, in which event notice of not less than seven days shall be given to show cause why the appointment shall be continued or terminated. All notices hereunder shall also be given to the heirs apparent or presumptive of such person, including the husband or wife, if any, and if such person is entitled to any benefit, estate or income paid or payable through the United States Veteran's Administration to such agency, and to the commissioner of public welfare.

Section 5. The petition of a public conservator shall not be granted when the husband, widow or an heir apparent or presumptive of the person, in writing, claims the right of appointment as conservator and files a petition therefor praying for appointment of himself or herself or of some other suitable person gives the bond required, and satisfies the probate court of the suitability of such appointment. Otherwise, the petition of a public conservator shall be granted if it appears to the probate court to be in the best interests of the person.

Section 6. A public conservator shall have the same powers and duties as a conservator appointed under chapter two hundred one and shall render accounts in the same manner as other conservators.

Section 7. A public conservator may be discharged from an estate by the probate court upon petition of the ward, or otherwise when it appears that the conservatorship is no longer necessary. The court shall order notice on such petition as it shall deem appropriate.

Section 8. A public conservator shall receive just and reasonable compensation for his services, and reimbursement for expenses actually incurred, in an amount approved by the probate court for such estate, such compensation to be payable out of the treasury of the commonwealth from funds appropriated therefor. In no event shall the compensation or expenses of a public conservator be paid or reimbursed out of the assets of the estate.

Section 9. The probate court in each county shall require every public conservator in such county to render an account

69 of his proceedings under any petitions for appointment at
70 least once a year.

71 *Section 10.* A public conservator shall, upon the appoint-
72 ment and qualification of his successor in office, render an
73 account of all estates to the probate court, and, upon a just
74 settlement of each such account, shall pay over and deliver to
75 his successor all money remaining in his hands on such ac-
76 count, and all other property, effects and credits of each ward
77 in his possession or under his control.

78 *Section 11.* Upon the death, resignation or removal of a
79 public conservator, the probate court shall issue a warrant to
80 some other public conservator in the same county, requesting
81 him to examine the account of such public conservator rela-
82 tive to the estates subject to his conservatorship, and to re-
83 turn to the probate court a statement of all such estates.
84 Thereupon the court shall appoint the public conservator
85 making the return as successor public conservator of each
86 such estate.

87 *Section 12.* This act shall take effect upon its passage.

The overall purpose of the conservators statutes in Massachu-
setts (G.L., c. 201, §16 et seq.) is to make available to persons
incapable of properly caring for their property, a method whereby
someone else will shoulder the burden of property management.
While Massachusetts law has provided for the appointment of
public administrators since 1839, it does not make provision for
the appointment of “public” conservators. *Lombard, Probate
Law and Practice, 21 Mass. Prac. Series*, § 942 at 462; 49th Re-
port of the Judicial Council at 143 (1973).

House 1940 would provide for the appointment of public con-
servators for any person who, because of advanced age, mental
weakness or physical incapacity, can not properly care for his or
her property. The major limitation on the appointment of a public
conservator under the proposed bill is that a person must have
“no husband, widow, heirs apparent or presumptive, or friend in
the Commonwealth.” Obviously, only a deceased person could
have a widow in the Commonwealth. The word “widow” should
be deleted and replaced with the word “wife.”

House 1940 is identical to House 1936 of 1973 which the Judi-
cial Council studied in its 49th Report. In its 1973 Report at page
144, the Judicial Council criticized the proposal for the appoint-
ment of public conservators because it did not

. . . distinguish between (1) advanced age or mental weak-
ness, or (2) physical incapacity. Section 3 of H. 1936 would

provide for the appointment of a public conservator even without the consent of a person who was neither of advanced age or mentally weak. A perfectly normal person, with full mental capacity, but with some physical incapacity could be forced to have a conservator appointed for him or her merely if there was no known husband or wife, heirs, or friends living in the Commonwealth.'

In 1973, we opposed, as being unnecessary, the bill providing for the appointment of public conservators, and we do so again now.

It would seem highly unlikely that H. 1940, if enacted, would ever enjoy widespread use. As we stated in our 49th Report at page 144:

We are of the opinion that public conservators are not needed. There are few living persons who, if merely of advanced age or if merely physically incapacitated, could not nominate some friend or relative to act as conservator.

Where there are persons who are concerned for the welfare of the elderly or physically incapacitated person, they can petition as "friends" and seek appointment as conservators under our existing statute (G.L. c. 201, §16).

Moreover, House 1940 specifically provides that public conservators should be compensated by the Commonwealth. Ordinarily, a conservator receives reasonable compensation from the assets of the estate. G.L. c. 206, §16; *Gilber v Crane*, 353 Mass. 775, 234 N.E. 2d 907 (1968). It is difficult to assign any sound reason for the provision in H. 1940 which compensates public conservators from public funds. A public administrator, appointed pursuant to G.L. 194, § 1 et seq., is allowed compensation from the estate. *Hilton v. Hopkins*, 275 Mass. 59, 64 (1931).

IV. PROPERTY

- A. Mortgage Foreclosures — Self-Help or Judicial Review?
- B. Acquisition of Certain Graves by Municipalities.
- C. Conveyance of Land — Necessity of Acknowledgment by Grantee
- D. Tenancies of Two or More in Personal Property

(A) MORTGAGE FORECLOSURES — SELF-HELP OR JUDICIAL REVIEW?

HOUSE (1975) No. 5647

AN ACT PROHIBITING MORTGAGE FORECLOSURES AGAINST CERTAIN UNEMPLOYED PERSONS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 Chapter 244 of the General Laws is hereby amended by in-
2 serting after section 14 the following new section: —

3 *Section 14A.* (1) The provisions of this section shall apply
4 only to obligations secured by mortgage, trust deed or other
5 security in the nature of a mortgage upon real property used
6 for residential purposes by a mortgagor who is unemployed,
7 according to the definition appearing in section 1(r) of Chap-
8 ter 151A of the General Laws, and where the obligation was
9 so secured prior to the period of unemployment and con-
10 tinued during said period.

11 (2) In any proceeding commenced in any court during the
12 period of unemployment referred to hereinabove to enforce
13 such obligation arising out of nonpayment of any sum there-
14 under due, the court may after hearing, in its discretion, on
15 its own motion, and shall, on application to it by such unem-
16 ployed person or some person on his behalf, unless in the
17 opinion of the court, the ability of the defendant to comply
18 with the terms of the obligation is not materially affected by
19 reason of his unemployment (a) stay the proceedings until
20 three months after the period of unemployment, or (b) make
21 such other disposition of the case as may be equitable to con-
22 serve the interests of all parties.

23 (3) No sale, foreclosure, entry, or seizure of property for
24 nonpayment of any sum due under any such obligation,
25 whether under a power of sale, or otherwise, shall be valid if
26 made after the effective date of this act and during the period

of unemployment or within three months thereafter, except pursuant to a written agreement between the parties or their assignee executed during or after the period of unemployment of the mortgagor unless upon an order previously granted by the court and a return thereto made and approved by the court.

(4) Any person who shall knowingly make or cause to be made any sale, foreclosure, entry or seizure of property, defined as invalid by subsection (3) hereof, or attempts so to do, shall be guilty of a misdemeanor and shall be punished by imprisonment for no more than one year in a jail or house of correction or by a fine of not more than \$1000, or both.

HOUSE (1975) No. 3682

AN ACT TO PROVIDE JUDICIAL PROCEDURE FOR THE FORECLOSURE OF REAL ESTATE MORTGAGES.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 14 of chapter 244 of the General Laws, as most recently amended by chapter 2 of the acts of 1920, is hereby further amended by inserting after the third sentence thereof the following new sentence: — No sale under such power shall be effectual to foreclose a mortgage of a dwelling of four or fewer separate households unless such sale is authorized by a judgment entered pursuant to the provisions of sections seventeen C through seventeen J.

SECTION 2. Chapter 244 of the General Laws is hereby further amended by striking out section 17C and inserting in place thereof the following sections: —

Section 17C. Permission to Exercise Power of Sale Contained in a Mortgage.

(a) No sale pursuant to any power contained in a mortgage of a dwelling of four or fewer separate households shall be effectual to foreclose the mortgage unless the sale is authorized by judgment entered under the provisions of this section and sections seventeen D through seventeen J.

(b) An action for permission to exercise a power of sale contained in a mortgage of a dwelling of four or fewer separate households may be commenced (i) in the land court, or (ii) in the superior court or the probate court for any county in which any part or all of the real estate subject to the mortgage is located or in which any plaintiff is domiciled or has a usual place of business.

26 In the event that any part or all of said real estate is located
27 in Berkshire, Hampden, Hampshire, Franklin, or Worcester
28 County, any defendant may as of right remove an action
29 commenced in the land court to the superior court or the pro-
30 bate court for the county in which any part or all of said real
31 estate is located. Such removal shall be effected by filing
32 written notice with the land court and the court to which the
33 action is removed and by serving a copy thereof by registered
34 or certified mail on all parties to the proceeding not less than
35 seven days before the date for filing responsive pleadings in
36 the action.

37 (c) In any such action, the complaint shall set forth a short
38 and plain statement of the claim, including but not limited to a
39 statement of any default claimed by the plaintiff, and a state-
40 ment that the mortgage is of a dwelling of four or fewer sepa-
41 rate households. The complaint may contain demands for
42 judgment for such relief as the plaintiff may be entitled to in
43 connection with the mortgage, including but not limited to a
44 declaration that no person having an interest in the property
45 is entitled to the benefits of the Act of Congress known as the
46 Soldiers' and Sailors' Civil Relief Act of 1940, as amended.

47 (d) When the mortgagee claims default in any payment or
48 payments due under the mortgage, no action may be com-
49 menced under this section unless (i) the mortgagee has given
50 to the owner of the equity of redemption of the mortgaged
51 real estate the written notice specified in the following para-
52 graph (e), and (ii) the default in payment has not been cured
53 within fourteen days as provided in the notice; provided,
54 however, that this requirement of notice shall not apply when
55 the owner has been given two such notices with respect to
56 any two distinct defaults in payment during the two-year
57 period immediately preceding the commencement of the ac-
58 tion.

59 (e) The notice required by the preceding paragraph (d) shall
60 be in substantially the following form: —

61 NOTICE OF DEFAULT IN MORTGAGE PAYMENT

62 This is to notify you that you are in default on the mortgage
63 loan secured by your property at [address], held by the un-
64 dersigned mortgage lender, because you have not paid the fol-
65 lowing payment(s):

66	<i>Date Due</i>	<i>Amount</i>	<i>Late Charge (if any)</i>
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67 You may cure the default by paying the sum of \$ to the
68 lender, at the address shown below on or before [date which
69 is at least fourteen days after notice is mailed]. If you do so,
70 your mortgage account will be current and the lender will
71 take no further action with respect to the default.

If you do not pay within the time stated above, the lender may commence proceedings to foreclose the mortgage by selling your property or take other action to enforce the lender's rights.

[Any part of the following sentences may be omitted if inapplicable.]. In addition, the lender may declare the entire unpaid amount of the loan immediately due and payable. If the proceeds of the sale are not sufficient to pay the loan in full, you may continue to be liable to pay any deficiency. You may also be liable for the lender's costs in connection with enforcing the lender's rights under the mortgage.

[Name and address of mortgagee]

The notice shall be deemed given when delivered to the owner or when mailed to the owner at the owner's address last known to the mortgagee.

If the notice given under this section includes the sentence referring to liability for deficiency, it shall be deemed to be the form of notice required by section seventeen B; provided, that nothing in this sentence shall be construed to alter or limit any other requirement of section seventeen B.

(f) Nothing in the preceding paragraphs (d) and (e) shall be construed to alter or limit any right or power of any mortgagee to assess or collect any late charge, penalty, or other amount due under any mortgage.

Section 17D. Form of Notice and Service.

(a) Notice of an action for permission to exercise a power of sale shall be given by the plaintiff to each person appearing of record in the registry of deeds or the registration district of the land court in which the mortgage is recorded to have an interest in the real estate that would be adversely affected by the foreclosure, by service upon each such person of a copy of the complaint and of the notice specified in the following paragraph (b), not less than fourteen days before the date specified in such notice for filing responsive pleadings.

(b) Notice in substantially the following form may be served by the plaintiff.

Court

, ss.

To [insert the names of all defendants named in the complaint] and to all whom it may concern:

Take notice that [plaintiff] has commenced in this court an action for permission to foreclose a mortgage on the premises located at [address of mortgaged premises] by the exercise of a power of sale as more fully described in the complaint served upon you herewith. If you wish to assert any defense to such foreclosure or any right under the Soldiers' and

118 Sailors' Civil Relief Act of 1940, as amended, you must file
119 with the court and serve upon _____, the plaintiffs' at-
120 torney, whose address is _____, an answer or other
121 pleading stating the facts on which you claim that such fore-
122 closure should not be permitted, on or before
123 [not earlier than 14 days after service of notice]. If you fail to
124 do so, judgment by default will be taken against you for the
125 relief demanded in the complaint, and the plaintiff will be
126 permitted to proceed to foreclose the mortgage.

127 _____ WITNESS _____, Esquire
128 Judge of this Court, this _____ day of _____, 19_____

129 [Seal]

130 _____ Clerk of Court

131 This notice is issued pursuant to Massachusetts General
132 Laws chapter 244, §17D.

133 (c) (1) Service upon the owner of the equity of redemption
134 shall be made by personal service as provided in Rule 4 of the
135 Massachusetts Rules of Civil Procedure, as the same may be
136 from time to time amended.

137 (2) Service upon any other defendant may be made by per-
138 sonal service or by mailing copies of the complaint and notice
139 to such defendant, registered or certified mail, return receipt
140 requested, at such defendant's address last known to the
141 plaintiff. Service made by mail shall be deemed made when
142 mailed.

143 (3) A copy of the notice shall be published at least once not
144 less than twenty-one days before the date for filing responsive
145 pleadings as specified therein, in a newspaper of general cir-
146 culation published in the town or, if no such newspaper is
147 published in the town, in the county in which the real estate is
148 situated. In addition, a copy of the notice shall be recorded or
149 registered in each registry of deeds and in each registry dis-
150 trict of the land court in which the mortgage is recorded or
151 registered.

152 (4) If the person making service on any defendant as pro-
153 vided in subparagraph (1) or (2) of this paragraph (c) makes
154 return that after diligent search he cannot find the defendant
155 nor the defendant's last and usual abode nor any other person
156 upon whom service can be made, or that he can find no ad-
157 dress at which service may be made by mail or that service
158 by mail was refused, the publication provided by paragraph
159 (3) shall be deemed sufficient service upon such defendant.
160 Failure to serve any person or to publish or record the notice
161 shall not affect the validity of the proceeding as to any person
162 duly served.

163 *Section 17E. Responsive Pleadings.*

164 (a) On or before the date specified in the notice prescribed
165 by section seventeen D, every defendant shall serve upon the
166 plaintiff and file with the court an answer admitting or deny-
167 ing the several allegations of the complaint and containing a
168 short and plain statement of any facts upon which the defen-
169 dant claims that foreclosure should not be permitted. The
170 answer shall state as a counterclaim any claim for relief the
171 court has power to give which at the time of serving the an-
172 swer the defendant has against any plaintiff, if it arises out of
173 the making or performance of the mortgage that is the subject
174 of the plaintiff's claim and does not either require for its ad-
175 judication the presence of third parties over whom the court
176 cannot acquire jurisdiction or constitute an action required by
177 law to be brought in a county other than the county in which
178 the court is sitting. No other counterclaim or cross-claim
179 against any person shall be pleaded or heard; provided, how-
180 ever, that nothing in this section shall be deemed to alter or
181 affect the right of any such defendant to bring a separate ac-
182 tion on any such claim in any court of competent jurisdiction.

183 (b) Notwithstanding any statute or rule of court, no default
184 or judgment entered for failure to file an answer as required
185 by this section may be vacated after foreclosure pursuant to
186 such judgment, except upon a showing by the party seeking
187 to vacate that service was not made upon him as provided in
188 section seventeen D and that he had no actual knowledge of
189 the proceeding.

190 *Section 17F. Rules of Procedure.*

191 In any action brought under the provisions of section sev-
192 enteen C, the procedure shall be governed by the following
193 rules and by the rules of procedure applicable in the court in
194 which such action is heard to the extent that such rules are
195 not inconsistent with the provisions of this chapter.

196 (a) Any discovery sought by any party shall be commenced
197 within seven days after the date for filing answers as provided
198 in section seventeen E and shall be completed within
199 twenty-one days after the date for filing answers; provided,
200 however, that the court may for good cause shown extend the
201 time upon a motion filed and served not more than fourteen
202 days after the time for filing answers.

203 (b) The court may entertain motions for and may enter par-
204 tial or final summary judgment for any party pursuant to the
205 procedures provided in Rule 56 of the Massachusetts Rules
206 of Civil Procedure, as the same may be from time to time
207 amended. The court may make such interlocutory orders as it
208 finds necessary to preserve the condition of the property and
209 the rights of the parties, including an order requiring the
210 mortgagor or any of the responsible parties to pay any sums
211 due under the mortgage from time to time and an order that

the property be sold and proceeds paid into court; *provided*, that any motion for an order permitting sale before adjudication of default shall be accompanied by an affidavit setting forth specific facts supporting the conclusion that the condition or value of the real estate is in jeopardy.

(c) An action brought under the provisions of section seventeen C shall be heard before any other pending actions except an action for injunctive relief or an earlier-filed action of the same kind.

Section 17G. Judgment.

(a) If it appears that the plaintiff is entitled to exercise the power of sale granted in the mortgage the court shall enter a judgment granting permission to foreclose.

(b) If it appears that any defendant is entitled to the benefits of the Act of Congress known as the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, the court may make such other orders and decrees, including any order for stay or any judgment or order authorizing entry on and/or sale of the real estate, as may be necessary to comply with the provisions of that Act.

(c) Any final judgment entered under this section shall declare whether the mortgage to be foreclosed is of a dwelling of four or fewer separate households.

Section 17H. Approval of Entry or Sale.

(a) A foreclosure effected by exercise of the power of sale pursuant to a judgment entered under paragraph (a) of section seventeen G or a foreclosure effected by sale or entry or otherwise pursuant to a judgment entered under paragraph (b) of section seventeen G may be approved by the court at any time after the expiration of the period for appeal from said judgment. There shall be no appeal from or exception from such approval.

(b) The period of thirty days within which a copy of the notice of sale and an affidavit are required to be recorded by section fifteen and the period of thirty days within which a memorandum or certificate of entry is required to be recorded by section two shall be computed from the time that the court approved the sale or entry as provided in this section.

Section 17J. Recording Judgment.

A copy of the judgment permitting foreclosure and the approval thereof may be recorded or registered in the registry of deeds or in the registry district of the land court in which the mortgage is recorded or registered, and if so recorded shall be conclusive evidence of the plaintiff's right to foreclose and of compliance with the provisions with the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, as against all named defendants in the proceeding.

Section 17K. Waiver.

The provisions of sections seventeen A, seventeen B, and

261 paragraph (a) of section seventeen C shall not be waived, and
262 any agreement to waive them or covenant not to rely upon
263 them made before suit is commenced shall be void.

264 SECTION 3. Chapter 57 of the acts of 1943, as most re-
265 cently amended by chapter 105 of the acts of 1959, is hereby
266 further amended by inserting after the last sentence of para-
267 graph (1) the following new sentence: — Any final judgment
268 or order shall include a declaration that the mortgage to be
269 foreclosed is or is not of a dwelling of four or fewer separate
270 households.

271 SECTION 4. Said chapter 57 of the acts of 1943 is hereby
272 further amended by inserting after the last sentence thereof
273 the following new paragraph: — An action for permission to
274 exercise a power of sale brought under the provisions of sec-
275 tion seventeen C of chapter two hundred and forty-four of the
276 General Laws shall not be subject to the provisions of this
277 chapter.

HOUSE (1975) No. 374

AN ACT TO PROVIDE FOR AN ADVERSARY HEARING BEFORE FORECLOSURE OF A MORTGAGE.

*Be it enacted by the Senate and House of Representatives in
General Court assembled, and by the authority of the same, as
follows:*

1 SECTION 1. Chapter 244 of the General Laws is hereby
2 amended by striking out sections 1 and 2, as appearing in the
3 Tercentenary Edition, and inserting in place thereof the fol-
4 lowing four sections: —

5 *Section 1.* A mortgage, or person holding under him may,
6 after breach of condition of a mortgage and due notice of such
7 breach by service of process in accordance with the provi-
8 sions of section 1A, recover possession of the land mort-
9 gaged.

10 *Section 1A.* Service as required in section one, shall be
11 made by writ of foreclosure, with summons, in form pre-
12 scribed by the supreme judicial court, and shall be made upon
13 the owner of equity of redemption and subsequent lienors of
14 record, whose rights may be affected; at least seven days be-
15 fore the return day of said writ, by sheriff or deputy sheriff, at
16 the last and usual address of said person to be served, or by
17 mailing, registered mail, return receipt requested to the per-
18 son to be served, at his last usual place of residence, at least

19 fourteen days before return date. The return receipt endorsed
20 by the addressee or his agent shall be evidence of service. If
21 said person in interest who is to be served is a foreign corpo-
22 ration, or not a resident of, or within the state, then service
23 thereof may be made, upon them in the manner provided by
24 section 6 of chapter 223 and return date shall be not less than
25 twenty-one days from date of mailing.

26 *Section 1B.* There shall be a hearing on the return date, in
27 the appropriate superior, district or land court from whence
28 the writ issued. After hearing and upon the filing of a military
29 affidavit on the form prescribed by the supreme judicial court
30 and unless it is determined the persons affected are in the
31 military service, then, if no proper defense is offered, the
32 court shall issue a foreclosure order in accordance with the
33 provisions of section 14. If it is determined that any person
34 affected is in the military service then the petitioner shall
35 comply with chapter 57 of the acts of 1943 as amended.

36 *Section 2.* The order of the court shall be recorded in the
37 registry of deeds of the county or district where the land lies,
38 within thirty days of the date of the order.

39 SECTION 2. Said chapter 244 is hereby further amended
40 by striking out section 10, as appearing in the Tercentenary
41 Edition, and inserting in place thereof the following section:

42 *Section 10.* A mortgage, or a person claiming under him in
43 possession under the preceding section, may, after breach of
44 condition, or bring an action, under section one, with the
45 same effect as if he were not in possession.

46 SECTION 3. Section thirteen of said chapter two hundred
47 and forty-four is hereby repealed.

48 SECTION 4. Section 14 of said chapter 244, as appearing
49 in the Tercentenary Edition, is hereby amended by striking
50 out, in line 5, the words, 'and without action,' and inserting in
51 place thereof the following words: — and after obtaining a
52 foreclosure order as provided in this chapter.

53 SECTION 5. Said chapter 244 is hereby further amended
54 by inserting after section 14 the following section: —

55 *Section 14A.* A copy of the notice of the foreclosure order
56 shall be forwarded by the foreclosing party to all persons re-
57 ferred to in section 1A, by certified or registered mail, return
58 receipt requested.

59 SECTION 6. Section seventy-nine, section eighty, section
60 eighty A, and section eighty B of chapter sixty are hereby re-
61 pealed.

SENATE (1975) No. 947

AN ACT TO PROVIDE JUDICIAL PROCEDURE FOR THE FORECLOSURE OF REAL ESTATE MORT- GAGES.

*Be it enacted by the Senate and House of Representatives in
General Court assembled, and by the authority of the same, as
follows:*

62 SECTION 1. Section 14 of chapter 244 of the General
63 Laws, as most recently amended by chapter 2 of the acts of
64 1920, is hereby further amended by inserting after the third
65 sentence thereof the following new sentence: — No entry or
66 sale under such power shall be effectual to foreclose a mort-
67 gage of a dwelling of four or fewer separate households unless
68 such sale is authorized by a judgment entered pursuant to the
69 provisions of sections seventeen C through seventeen.

70 SECTION 2. Chapter 244 of the General Laws is hereby
71 further amended by striking out section 17C and inserting in
72 place thereof the following sections: —

73 *Section 17C. Permission to Exercise Power of Sale Con-*
74 *tained in a Mortgage*

75 (a) No entry or sale pursuant to any power contained in a
76 mortgage of a dwelling of four or fewer separate households
77 shall be effectual to foreclose the mortgage unless the sale is
78 authorized by judgment entered under the provisions of this
79 section and sections seventeen D through seventeen J.

80 (b) An action for permission to exercise a power of sale
81 contained in a mortgage of real estate may be commenced (i)
82 in the land court, or (ii) in the superior court, the probate
83 court, or the housing court for any county in which any part
84 of all of the real estate subject to the mortgage is located or in
85 which any plaintiff is domiciled or has a usual place of busi-
86 ness.

87 In the event that any part or all of said real estate is located
88 in Berkshire, Hampden, Hampshire, Franklin, Worcester,
89 Barnstable or Dukes County, any defendant may as of right
90 remove the action to the superior court, the probate court, or
91 the housing court for the county in which any part or all of
92 said real estate is located. Such removal shall be effected by
93 filing written notice thereof with the court in which the action
94 was commenced and serving a copy of said notice on all par-
95 ties to the proceeding before the date for filing responsive
96 pleadings in the action.

97 (c) In any such action, the complaint shall set forth a short
98 and plain statement of the claim, including but not limited to a
99 statement of the defaults claimed by the plaintiff, and a

statement that the mortgage is of a dwelling of four or fewer separate households. The complaint may contain demands for judgment for such relief as the plaintiff may be entitled to in connection with the mortgage, including but not limited to a declaration that no person having an interest in the property is entitled to the benefits of the Act of Congress known as the Soldiers' and Sailors' Civil Relief Act of 1940, as amended.

Section 17D. Form of Notice and Service

(a) Notice of an action for permission to foreclose shall be given by the plaintiff to each person appearing of record in the registry of deeds or the registration district of the land court in which the mortgage is recorded to have an interest in the real estate, by service upon each such person of a copy of the complaint and of the notice specified in the following paragraph (b), not less than fourteen days before the date specified in such notice for filing responsive pleadings.

(b) Notice in substantially the following form may be served by the plaintiff:

.....Court
....., ss.

To [insert the names of all defendants named in the complaint] and to all whom it may concern:

Take notice that [plaintiff] has commenced in this court an action for permission to foreclose a mortgage on the premises located at [address of mortgaged premises] by the exercise of a power of sale as more fully described in the complaint served upon you herewith. If you wish to assert any defense to such foreclosure or any right under the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, you must serve upon, the plaintiff's attorney, whose address is, an answer or other pleading stating the facts on which you claim that foreclosure should not be permitted, on or before

.....[not earlier than 14 days after service of notice]. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint, and the plaintiff will be permitted to proceed to foreclose the mortgage.

WITNESS, Esquire
Judge of this Court, this day of,
19
[Seal]

.....
Clerk of Court

This notice is issued pursuant to Massachusetts General Laws chapter 244, §17D.

(c) Service of copies of the notice and complaint upon the mortgagor shall be made according to M.R.C.P. Rule 4. Service on other parties may be made by mailing by regis-

tered mail to such party at his last address appearing on the records of the mortgage or by any other method prescribed by applicable rule of court. In addition, a copy of the notice shall be recorded in each registry of deeds in which the mortgage is recorded. Failure to serve any party or to record the notice shall not, however, affect the validity of the proceeding as to any person duly served. Service made by registered mail pursuant to this section shall be deemed made when mailed.

Section 17E. Responsive Pleadings.

(a) On or before the date specified in the notice prescribed by section seventeen D, every defendant shall serve upon the plaintiff and file with the court an answer, together with any counterclaims against the plaintiff.

(b) Notwithstanding any statute or rule of court, no default or judgment entered for failure to file an answer as required by this section may be vacated after foreclosure pursuant to such judgment, except upon a showing that the party seeking to vacate was not duly served and had no actual knowledge of the proceeding.

Section 17F. Rules of Procedure

In any action brought under the provisions of section seventeen C, the procedure shall be governed by the following rules and by the rules of procedure applicable in the court in which such action is heard to the extent that such rules are not inconsistent therewith.

(a) Any discovery against any party to the action shall be completed with fourteen days after the date for filing answers as provided in section seventeen E; provided, however, that the court may for good cause shown extend the time for such discovery.

(b) The court may entertain motions for and may enter summary judgment for any party pursuant to the procedures provided in Rule 56 of the Massachusetts Rules of Civil Procedure.

(c) The court may make such interlocutory orders as it finds necessary to preserve the condition of the property and the rights of the parties, including an order requiring the mortgagor or any of the responsible parties to make the regular payments under the mortgage into court as they become due.

(d) Upon a showing that the security of the mortgagee is in jeopardy, the court may order that the property be sold and proceeds paid into court. A motion for immediate sale shall be accompanied by an affidavit setting forth specific facts supporting the conclusion that the condition or value of the property is in jeopardy. Said sale shall not be considered a sale following a judgment, and shall not affect the rights of the parties in the proceeding under this chapter.

(e) An action brought under the provisions of section seventeen C shall be heard before any other pending actions except an action for injunctive relief or an earlier-filed action for permission to foreclose.

Section 17G. Judgment

(a) If the plaintiff is entitled to exercise the power of sale granted in the mortgage the court shall enter a judgment granting permission to foreclose.

(b) If it appears that the plaintiff is entitled to foreclose and that the mortgagor or the owner of the equity of redemption may, under the terms of the mortgage, retain the property by paying an amount due or otherwise curing default, the court may enter a conditional judgment permitting the plaintiff to foreclose if within sixty days after the judgment the defendant has not paid the amount due or otherwise cured the default.

(c) If it appears that any defendant is entitled to the benefits of the Act of Congress known as the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, the court may make such other orders and decrees, including any order for stay or order directing sale of the real estate, as may be necessary to comply with the provisions of that Act.

(d) If it appears that the plaintiff is not entitled to foreclose, the court shall dismiss the complaint, and said dismissal shall bar any subsequent action under this chapter based on alleged defaults arising during the same period of time.

(e) Any final judgment entered under this section shall declare whether the mortgage to be foreclosed is of a dwelling of four or fewer separate households.

Section 17H. Approval of Entry or Sale

(a) An entry taken for the purpose of foreclosure, or a foreclosure effected by exercise of the power of sale or by any other method, pursuant to a judgment entered under section seventeen G may be approved by the court at any time after the expiration of the period for appeal from the said judgment. There shall be no appeal from or exception from such approval.

(b) The period of thirty days within which a copy of the notice of sale and an affidavit are required to be recorded by section fifteen and the period of thirty days within which a memorandum or certificate of entry is required to be recorded by section two shall be computed from the time that the court approves the sale or entry as provided in this section.

Section 17J. Recording Judgment.

A copy of the judgment permitting foreclosure and the approval thereof may be recorded in the registry of deeds in which the mortgage is recorded, and if so recorded shall be conclusive evidence of the plaintiff's right to foreclose and of compliance with the provisions with the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, as against all named defendants in the proceeding.

Section 17K. Chapter 57 of the acts of 1943, as most recently amended by chapter 105 of the acts of 1959, is hereby further amended by inserting after the last sentence thereof the following new sentence: — Any final judgment shall include a declaration that the mortgage to be foreclosed is or is not of a dwelling of four or fewer separate households.

No action for permission to exercise a power of sale shall be brought until the mortgagee has given the mortgagor the notice provided in this section. The notice so required shall be deemed to be delivered when delivered to the mortgagor or when mailed to the debtor at the mortgagor's address last known to the mortgagee. If a mortgagor cures a default after receiving notice and again defaults, the mortgagee shall give another notice before bringing an action or proceeding against the property with respect to the subsequent default, but no notice is required in connection with a subsequent default if, within the period commencing on the date of the mortgage subject to this section and the date of the subsequent default, the mortgagor has cured a default, after notice three or more times.

a) The notice shall be in writing and shall be given to the buyer ten days or more after the default. The notice shall conspicuously state the rights of the buyer upon default in substantially the following form: —

The heading shall read: "Rights Of Mortgagor Under Massachusetts Mortgage Foreclosure Law." The body of the notice shall read: "Your mortgage is in default. You may cure your default by paying to (name and address of mortgagor) (amount due) before (date which is twenty-one days after notice is mailed). If you pay this amount within the time allowed, you are no longer in default, and may continue as though no default had occurred.

If you do not cure the default by the date stated above, the mortgagee can go to court and foreclose the mortgage, and then sell the house.

It is very important that you act quickly to protect your property."

b) During the twenty-one day period after delivery of the notice required by this section, the mortgagee may not bring any action against the mortgagor or proceed against the property.

c) No charge may be imposed as a condition for the cure of a default, except the actual payments which are in arrears and late charges provided in the mortgage instrument.

A real estate mortgage is a deed of real estate given to secure payment of a promissory note or an obligation. If the borrower defaults, the holder has the right in Massachusetts to exercise the "Power of Sale" if contained in the mortgage deed.

The Statutory Power of Sale — Ch. 183, Sec. 21

§ 21. "Statutory power of sale" in mortgage. The following "power" shall be known as the "Statutory Power of Sale," and may be incorporated in any mortgage by reference:

(POWER)

But upon any default in the performance or observance of the foregoing or other condition, the mortgagee or his executors, administrators, successors or assigns may sell the mortgaged premises or such portion thereof as may remain subject to the mortgage in case of any partial release thereof, either as a whole or in parcels, together with all improvements that may be thereon, by public auction on or near the premises then subject to the mortgage, or, if more than one parcel is then subject thereto, on or near one of said parcels, or at such place as may be designated for that purpose in the mortgage, first complying with the terms of the mortgage and with the statutes relating to the foreclosure of mortgages by the exercise of a power of sale, and may convey the same by proper deed or deeds to the purchaser or purchasers absolutely and in fee simple; and such sale shall forever bar the mortgagor and all persons claiming under him from all right and interest in the mortgaged premises, whether at law or in equity.

Judicial Proceedings in Foreclosure Cases

No judicial proceeding is necessary to foreclose a mortgage by exercising the power of sale.

For the purpose of establishing a good record title, it is now almost the universal practice to seek authority to exercise the power of sale in such manner as to eliminate any doubt that an interested party lost legal rights while in the military service.

Chapter 105 of The Acts of 1959

Section 2 of Chapter 105 of the Acts of 1959 provides in pertinent part:

In proceedings under this section, no person who is not entitled to the benefit of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended, with respect to the mortgage . . . shall be entitled to appear or be heard in such proceeding except on behalf of a person so entitled . . . stating that he is in the Service and thus entitled to the benefit of the Act . . . Such proceedings shall be limited to the issues of the existence of such persons and their rights, if any.

Thus, St. 1959 c. 105, § 2 limited the issues which a mortgagor may raise at a hearing under the Soldiers' and Sailors' Civil Relief

Act of 1940. The hearing provided to the mortgagor is, therefore, restricted in scope and purpose and the merits of any foreclosure controversy are not dealt with in this proceeding. Any defenses (such as payment or misrepresentation) may not be raised in a "Soldiers' and Sailors' " case except the issue of military service.

CONSTITUTIONAL PROTECTION MOVEMENT

In 1969 the United States Supreme Court decided *Sniadach vs. Family Finance Corp.* 395, U.S. 337 (1969). In *Sniadach*, the Wisconsin wage garnishment statute was attacked as unconstitutional. The Supreme Court agreed that the garnishment of a debtor's wages without notice, and without an opportunity for a hearing before the attachment is made, contravened the Due Process Clause of the 14th Amendment. Central to the Court's decision was the fact that a person's wages are often his only asset and seizure of them " . . . may as a practical matter drive a wage earning family to the wall." *Id.* at 341-42.

Three years later, the Supreme Court extended its *Sniadach* ruling in *Fuentes v. Shevin*, 407 U.S. 67 (1972). In *Fuentes*, a State replevin statute authorizing ex parte repossession of a debtor's goods was struck down as violative of the 14th Amendment.

By this decision, the Supreme Court clearly stated that procedural due process (in the form of notice and a prior hearing) must be afforded the debtor.

Following *Siadach* and *Fuentes*, the constitutional validity of nonjudicial foreclosure came under fire. There is a discussion of several recent cases by Pedowitz in *Current Developments In Summary Foreclosure*, 9 Real Prop. Probate and Trust J. 421 (1974). Within the past year, there have been several cases which have addressed the question of whether statutes permitting foreclosure by a power of sale contravene constitutional due process guarantees. Most of the challenges rest on due process grounds and are premised on the *Sniadach* and *Fuentes* cases. Some of these cases turn on differing determinations by the court of what constitutes "state action."

In *Beaton vs. Land Court*, 1975 Adv. Sh. 1005, 326 N.E. 2d 302, 1975, (cert. den.) the Massachusetts Supreme Judicial Court heard a foreclosure case appeal which it labelled "utterly without merit." The petitioners in this case had mortgaged their real

property by a mortgage deed containing a Statutory Power of Sale. Upon default, the mortgagee initiated proceedings to foreclose.

Notice of a Petition to Foreclose the Mortgage, under the provisions of the so-called Soldiers' and Sailors' Civil Relief Act of 1940, as provided for under St. 1943 c. 57 as amended by St. 1945, c. 120 was given to the interested parties and published as provided therein calling upon them to file a written appearance by a certain date if they objected thereto. The answer presented by the Beatons raised the defense of fraud, but it did not claim that any party was entitled to the benefits of the 1940 Soldiers' and Sailors' Act. The Land Court refused to accept the answer filed by the Beatons on the ground that St. 1959, c. 105, § 2 provided that only the military status of the parties might be raised at such proceedings. *Beaton v. Land Court*, *supra* at 1007.

The essence of the petitioners' constitutional claim in *Beaton* was that St. 1959, c. 105, § 2 "denies a mortgagor the opportunity to appear and raise other defenses which might invalidate the foreclosure." *Id.* at 1010. In support of their contention, the petitioners relied primarily on *Fuentes v. Shevin*, 407 U.S. 67 (1972) and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

In *Beaton*, however, lack of adequate notice was not at issue. The statutory notice requirements of St. 1943, c. 57, as amended, had been complied with and the appellants' complaint was that no hearing on the merits was open to them by virtue of St. 1959 c. 105, § 2. In rejecting the claim that St. 1959, c. 105, § 2 unconstitutionally infringed on a mortgagor's right to attack a mortgagee's decision to foreclose, the Supreme Judicial Court relied on a series of cases permitting restrictions on the issues which may be raised in certain actions. See, *Bianchi v. Morales*, 262 U.S. 170 (1923) (statute permitting possessory suit by mortgagee in which only payment may be raised as a defense held constitutional); *Lindsey v. Normet*, 405 U.S. 56 (1972) (statute permitting possessory suit by landlord for nonpayment of rent in which tenant may only raise defense of payment held constitutional).

Central to the decision in *Beaton* was the fact that a mortgagor has other available remedies. If, for example, the mortgagor has a valid defense against the foreclosure, he may raise it in a civil suit and seek an injunction to stop the foreclosure sale.

Bryant v. Jefferson Federal Savings and Loan Assoc., 509 F 2d 511 (D.C. Cir. 1974) involved a challenge to a District of Columbia statute authorizing the inclusion of a power of sale in mortgages and deeds of trust. The statute gave the holder of a mortgage the right to exercise the power of sale and imposed certain notice requirements thereon. The statute further provided that the property might be sold at a public auction without a hearing prior to the sale.

The petitioners in *Bryant* relied principally on the *Fuentes* and *Snidach* cases for the proposition that a pre-judgment taking of property violates constitutional due process.

The court's analysis proceeded on the familiar principle that "(t)he due process clause is a limitation on governmental, not private, action." The petitioners advanced three arguments to support a finding that state or governmental action was involved in power of sale foreclosures under the statute. *First*, it was argued that the statute which authorizes the procedures to be followed in exercising a power of sale "entangles" the government in the challenged conduct thus making it state action. *Secondly*, the statute encourages the use of power of sale provisions in mortgage instruments. *Finally*, the legislation clothes the private creditor with a public function.

The Court of Appeals rejected all of these contentions. The court stated that the mere passage of legislation dealing with private contract matters does not constitute governmental action. Moreover, the statutes do not encourage the use of the power of sale, but rather impose certain limitations on its use. Finally, a power of sale is not a public function since it existed long before the statute.

While the court in *Bryant* did not reach the question of the adequacy of the notice and hearing provisions of the statute, it did indicate that even if governmental action was involved in this case, the statutes would not have been unconstitutional on their face.

In *D. H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174 (1972), the United States Supreme Court held that confession of judgment clauses in debt instruments are not unconstitutional per se. The court in *Bryant* found *Overmeyer* controlling on the issue of the validity of the challenged statutes.

State Action

In *Turner v. Blackburn*, 389 F. Supp. 1250 (W.D.N.C. 1975), a North Carolina statute authorizing foreclosure by power of sale was attacked on due process grounds for failing to provide for adequate notice and an opportunity to be heard. The statute in question provided for notice by posting on the courthouse door and by publication, but did not provide for personal notice.

The first step in the court's analysis centered on the question of state action. The defendants argued that the statute did not involve the direct participation of the state in the foreclosure proceedings. Rather, they contended that the clerk of courts, by accepting and filing reports of the foreclosure sale, was merely performing a ministerial function. The court in *Turner* was unimpressed with this line of reasoning and held that the challenged statute significantly involved the state in the foreclosure process. Under the North Carolina statute, the clerk of courts has the following powers and responsibilities. First, the clerk has contempt power to enforce the failure to file timely and complete reports of the foreclosure sale. Secondly, filing the report with the clerk is a precondition to a valid foreclosure sale. Finally, the clerk has discretion to accept or reject an "upset bid;" i.e., a higher bid after the foreclosure sale requiring a resale of the property. The court concluded that these acts are not ministerial only, but involved the clerk, and therefore the state, in foreclosure proceedings to such an extent as to constitute state action.

After concluding that the 14th Amendment applied to this case, the court in *Turner* proceeded to scrutinize the notice which was given to the homeowner. The court found the notice defective since it was not designed for the purpose of "actually informing" the homeowner. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) was cited. The court stated that it was clearly unreasonable to expect the petitioner to receive notice of the foreclosure action through the posting and publication requirements provided in North Carolina.

Unlike the Massachusetts Supreme Judicial Court in *Beaton v. Land Court*, the *Turner* court did not accept the argument that alternative remedies were available to the homeowner. The court summarily rejected the contention that the "upset bid" procedure constituted a hearing. Moreover, the mortgagor's right to seek injunctive relief was deemed inadequate to satisfy the requirements of due process, since the mortgagor would have to bear the bur-

den of proof and would have to put up an indemnity bond. Furthermore, the court appears to indicate that under the North Carolina statute, injunctive relief can only be sought *after* the foreclosure sale. A hearing after being ousted is obviously not a hearing prior to the seizure of the property.

Waiver

As a final attempt to save the foreclosure in the Turner case, the defendants claimed that the mortgagor had waived her due process rights. The court found this contention unconvincing since the defendants had made no showing that the mortgagor fully understood the significance of a waiver of constitutional rights. *Id.* at 1260-61.

The court declined to invalidate the North Carolina statutes as being unconstitutional per se, but it did hold them invalid unless a) there is a voluntary and knowing waiver of the mortgagor's rights, or b) adequate notice and an opportunity for a prior hearing is afforded.

Chief District Judge Jones dissented in *Turner* on the ground that the foreclosure procedure did *not* constitute state action within the meaning of the 14th Amendment.

In *Garner v. Tri-State Development Co.*, 382 F Supp. 377 (E.D. Mich. 1974), a Michigan statute authorizing foreclosure by advertisement came under constitutional scrutiny. The statute did not provide for personal notice, and the sheriff is involved in the foreclosure proceedings to the extent that he executes a deed to the purchaser. In *Garner* the mortgagor had actual notice of the foreclosure sale. The Michigan statute made no provision for a hearing either before the sale or immediately thereafter.

Unfortunately, the court in *Garner* does not give a very thorough discussion of the Michigan statute, but concludes that the statute encourages foreclosure by advertisement. Moreover, the court held that while the sheriff only performs a ministerial function, his actions were sufficient to constitute state action.

Proceeding to the question of whether the Michigan statute measured up to constitutional standards, the court concluded that it did not. The fact that notice of the foreclosure sale was provided for was seen as immaterial since the notice to be constitutionally valid must relate to a hearing at which the validity of the foreclosure may be challenged.

As in the *Turner* decision in North Carolina, the *Garner* court in Michigan was unimpressed by the fact that the mortgagor could seek injunctive relief. The court stated:

In such a case the burden of proof is on the debtor, and even if successful he would have to bear his own attorneys' fees. This procedure must fairly be characterized as 'self-help,' and does not meet the requirements of either *Fuentes* or *Grant*.

Id. at 380.

The court in *Garner* remanded the case for a determination of whether there had been a waiver of the mortgagor's constitutional rights.

In attempting to reconcile the foregoing decisions it is well to keep in mind that the decision of the Supreme Judicial Court in *Beaton v. Land Court* is a very narrow one. In *Beaton*, the court was not confronted with a wholesale attack on foreclosure by power of sale under Mass. Gen. Laws Ann. ch. 244, § 14 et seq. Rather, the issue was whether a statute limiting the defenses which may be raised by a mortgagor at a hearing under the Soldiers' and Sailors' Civil Relief Act of 1940 was constitutional. On the basis of *Lindsey v. Normet*, 405 U.S. 56 (1972), the Supreme Judicial Court held that it was. See also, *Mitchell v. W. T. Grant*, 94 S. Ct. 1895, 1900 (1974) (reaffirming *Lindsey v. Normet*). The court was not asked to rule on the constitutionality of nonjudicial foreclosure and it did not do so except by way of dictum. Thus, the only proposition for which *Beaton* directly stands is that it is not unconstitutional to provide that only the military status of the mortgagor may be considered at a proceeding under the Soldiers' and Sailors' Civil Relief Act. The court did not attempt to distinguish *Fuentes* and *Sniadach* because it did not have to.

Furthermore, the decision by the Court of Appeals for the District of Columbia in *Bryant v. Jefferson Federal Savings and Loan Association* provides no insight into the question of whether nonjudicial foreclosure procedures would pass the standards of *Fuentes* and *Sniadach*. In *Bryant* that question was never considered since the court found that no state action was involved.

Massachusetts

As mentioned above, the Massachusetts Supreme Judicial Court has yet to squarely rule on the constitutionality of Chapter 244, §§ 14-17C foreclosures. However, the court did give some

indication that such foreclosures are constitutional. The court stated:

“No lack of notice or absence of opportunity to defend against the foreclosure is involved in this case and our discussion above suggests that a case presenting issues of such lack of notice or absence of opportunity to be heard in defense is unlikely to arise. Only if and when such a case arises would we have occasion to determine whether the due process clause even has any applicability to nonjudicial foreclosures . . .”

1975 Adv. Sh. at 1018 n. 6.

There is no doubt that a mortgagor will receive adequate notice of foreclosure proceedings in Massachusetts. Recently enacted legislation (Chapter 342 of the Acts of 1975) provides that a mortgagor *must* receive notice of the foreclosure sale by registered mail. However, it is equally clear that the court's conception of an adequate opportunity to be heard includes the mortgagor's right to initiate a suit of his own. This rationale was expressly rejected in both *Turner* and *Garner*. The question then is whether the mortgagor must be *provided* with a hearing to challenge the mortgagee's right to foreclose?

In *Fuentes v. Shevin*, 407 U.S. 67 (1972) the United States Supreme Court struck down two state statutes authorizing the summary seizure of goods and which did not provide for notice or an opportunity to be heard prior to the seizure. Of particular interest here is the Pennsylvania statute which the Court found to be constitutionally defective. Pursuant to the Pennsylvania statute “(t)he party seeking the writ (of replevin) is not obliged to initiate a court action for repossession . . . If the party who loses property through replevin seizure is to get even a post-seizure hearing, he must initiate a lawsuit himself.” In both *Fuentes* and *Sniadach* the aggrieved parties were immediately disposed of their property, without notice. Although by way of dictum, the *Beaton* court indicated its reasons for believing the foreclosure procedures in Massachusetts to be valid.

First, the court stated that “(i)t does not appear possible in this Commonwealth that a foreclosure could ever be made without the mortgagor's having first received some form of notice of the proposed foreclosure and an opportunity to oppose it.” *Beaton v. Land Court* 1975 Adv. Sheet at 1017

Secondly, the court pointed out that there are various methods available to the mortgagor to prevent the foreclosure if a valid defense does in fact exist.

In *Mitchell v. W. T. Grant*, 94 S. Ct. 1985 (1974) the Supreme Court somewhat diluted the full impact of the *Fuentes* decision. In *Mitchell*, a Louisiana statute which provided for the *ex parte* sequestration of a debtor's goods was upheld in the face of a constitutional challenge. Vital to the court's decision in *Mitchell* was the fact that: 1) the creditor must file an affidavit stating specific facts to support the issuance of the writ; 2) the matter must come before a judge and; 3) the issues to be resolved must be simple enough to minimize the necessity of a prior hearing. Furthermore, the Louisiana law provided for an immediate hearing after the issuance of the writ. In *Mitchell*, the majority balanced the interests of the creditor against the interests of the debtor and found the Louisiana statute reasonable. *But see, North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 95 S. Ct. 719 (1975) (Georgia garnishment statute invalidated where clerk issued writ based on mere conclusory allegations).

In the context of summary mortgage foreclosures, it would appear that the *Mitchell* approach (a balancing approach) has particular relevance. Both the mortgagor and the mortgagee have significant interests to protect. Under the Massachusetts procedure the mortgagor receives reasonable notice and a reasonable opportunity to be heard.

Summary Foreclosure — Recent Proposals

While summary foreclosure statutes have come under constitutional attack in recent years, there has been some movement in the direction of expanding the role of nonjudicial foreclosure procedures as a means of enforcing the mortgagee's rights. In 1973, Congress proposed the Federal Mortgage Foreclosure Act (H. R. 10688, 93d Cong., 1st Sess. Tit. IV 1973). Although this bill was not enacted, it is interesting that it was proposed in the midst of the constitutional uncertainty surrounding summary foreclosures.

The bill would have provided for notice to the defaulting mortgagor, but not for a hearing prior to the foreclosure sale. Section 411(b) provided that objections to the foreclosure may be submitted in writing by an interested party, and a "meeting" between the foreclosure commissioner and the interested party would be provided. The bill would have provided no other form of hearing

to the mortgagor and it is unclear whether the meeting referred to in section 411(b) would have been a full trial-type proceeding at which the merits of the dispute would have been considered.

The bill did make a distinction between foreclosures involving one- to four-family residential property and other kinds of property. House bill 3682 makes a similar distinction. Under section 409(c) of the proposed Federal Mortgage Foreclosure Act a foreclosure of such property must be preceded by the posting of notices on the premises. Under House Bill 3682, the foreclosure of such property must be accompanied by a judicial hearing on the merits.

Also of interest is the Proposed Uniform Land Transactions Act (Third Tent. Draft, 1974). The Uniform Act provides proposals similar to those found in the Federal Mortgage Foreclosure Act, and “. . . contemplates the regular and ordinary use of summary foreclosure by power of sale, coupled with a requirement for reasonable written notice to the debtor and to junior lienors.” Pedowitz, *Current Developments In Summary Foreclosure*, 9 Real Prop., Probate and Trust J. 421, 425 (1974).

While the Federal Mortgage Foreclosure Act was not enacted by Congress (perhaps because of doubts over its constitutionality), the Supreme Court's decision in *Mitchell v. W. T. Grant*, 94 S. Ct. 1895 (1974) may hasten reconsideration of a federal summary foreclosure act. Until the Supreme Court specifically addresses this question, one cannot provide a clear-cut answer on whether nonjudicial foreclosures comply with the due process clause.

RECOMMENDATIONS OF THE JUDICIAL COUNCIL THE CONSTITUTIONAL ISSUE

There is a possibility that the foreclosure of mortgages under the power of sale, without an opportunity for a hearing on the main issues, might, at some future time, be held unconstitutional by a United States District Court, a Court of Appeals or the United States Supreme Court. If such a situation were to occur, it would be appropriate for the General Court to enact a statute providing for a suitable judicial procedure in foreclosure cases.

A full scale trial in each foreclosure case might have the effect of discouraging lenders from making real estate mortgage loans, especially in marginal instances. The uncertainty and delay in the

course of such a proceeding, and the lack of any apparatus for the payment of principal and interest and taxes in the interim would prove a deterrent to the free flow of mortgage funds.

It may also be anticipated that the added costs of full-scale litigation of mortgage foreclosures would have to be absorbed by the public as a consumer.

All of this dictates a limited judicial hearing confined to the summary issue of whether or not the mortgagee has the right to exercise the power of sale.

THE CONSUMER ISSUE

If it is the legislative will to provide the small homeowner with a hearing before a foreclosure takes place, it is entirely possible to frame legislation to restrict such a hearing to those who reside in a residence designed for four or fewer families. If there is an overall constitutional question however, legislation to provide for the small homeowner only will not cure it.

Draft Act for Study

As it is our opinion that the existing Massachusetts power of sale procedure does not violate due process, we do not feel that there is an immediate necessity for the enactment of legislation in this field. We do, however, wish to put before the General Court a draft act for study and comment in the event (a) the Federal courts should declare our existing procedures violative of due process, or (b) in the event there is a strong desire for some consumer protection law in the foreclosure field.

AN ACT TO PROVIDE JUDICIAL PROCEDURE FOR THE FORECLOSURE OF REAL ESTATE MORTGAGES

SECTION 1. Section 14 of Chapter 244 of the General Laws, as most recently amended by Chapter 342 of the Acts of 1975 is hereby further amended by striking out the first paragraph thereof and inserting in place thereof the following paragraph:

“The mortgagee or person having his estate in the land mortgaged, or a person authorized by the power of sale, or the attorney duly authorized by a writing under seal, or the legal guardian or conservator of such mortgagee or the person acting in the name of such mortgagee or person may upon breach of condition do all the acts authorized or required by the power; but no sale under such power shall be effectual to

foreclose a mortgage, unless, previous to such sale, notice thereof has been published in accordance with the power in the mortgage and with this Chapter. The notice shall be published once in each of three successive weeks, the first publication to be not less than twenty-one days before the day of sale, in a newspaper, if any, published in the town where the land lies. If no newspaper is published in such town, notice may be published in a newspaper published in the county where the land lies, and this provision shall be implied in every power of sale mortgage in which it is not expressly set forth. A newspaper which by its title page purports to be printed or published in such town, city or county, and having a circulation therein, shall be sufficient to foreclose a mortgage, provided such sale is permitted by a judgment entered pursuant to the provisions of sections Seventeen C through Seventeen J. Said notice shall be sent by registered mail to the owners of record of the equity of redemption as of thirty days prior to the day of sale, said notice to be mailed 14 days prior to the day of sale to his last address known to the holder of the mortgage and if no address is known to him to the address of the owner as given on the deed or on the petition for probate of the estate by which he acquired title, if any, otherwise to the address to which the tax collector last sent the tax bill for the mortgaged premises, if known, otherwise to the address of any property to be sold."

and by adding to the last paragraph thereof the words "and mailed" after the word "published."

SECTION 2. Section 15 of Chapter 244 shall be amended by inserting the following at the end thereof:

"The affidavit shall be in substantially the following form:

Affidavit

named in the foregoing deed,
make oath and say that the principal, interest
obligation
mentioned in the mortgage above referred to was not paid or tendered or performed when due or prior to the sale, and that I published on
the day of 19 in the
a newspaper published, or by its title page
purporting to be published in aforesaid and having
a circulation therein, a notice of which the following is a true
copy:

(INSERT ADVERTISEMENT)

and that I mailed a copy of said notice by registered-certified mail on the day of 19 addressed to at being the last address known to me or the address otherwise prescribed by the statute

Pursuant to said notice at the time and place therein appointed,

I sold the mortgaged premises at public auction by an auctioneer, to above named, for dollars bid by , being the highest bid made therefor at said auction.

Signed and sworn to by the said
19 Before me

Notary Public''

SECTION 3. Chapter 244 of the General Laws is hereby further amended by striking out section 17C and inserting in place thereof the following sections:

*Section 17C. Permission to Exercise Power of Sale
Contained in a Mortgage*

(a.) No sale pursuant to any power contained in a mortgage, shall be effectual to foreclose the mortgage unless such sale is permitted by a judgment entered under the provision of this section and sections Seventeen D through Seventeen J.

(b.) An action for permission to exercise a power of sale contained in a mortgage may be commenced (i) in the land court, or (ii) in the superior court of any county in which any part or all of the real estate subject to the mortgage is located or in which any plaintiff resides or has a usual place of business.

(c.) In any such action, the complaint shall set forth a short and plain statement of the claim, including but not limited to (1) a statement of any default claimed by the plaintiff, and (2) to a declaration whether or not any person having an interest in the property is entitled to the benefits of the Act of Congress known as the Soldiers' and Sailors' Civil Relief Act of 1940, as amended. The complaint may contain demand for judgment for such relief as the plaintiff may be entitled to in connection with the mortgage.

Section 17D. Form of Notice and Service

(a.) Notice of an action for permission to exercise a power of sale shall be given by the plaintiff to each person appearing of record in the registry of deeds or the registry district in which the mortgage is recorded or registered to have an interest in the real estate that would be adversely affected by the foreclosure, by service upon each such person of a copy of the complaint and of the notice specified in the following paragraph (b.) not less than fourteen days before the date specified in such notice of filing responsive pleadings.

(b.) Notice in substantially the following form shall be served by the plaintiff:

Court

, ss.

To: (Insert the names of all defendants named in the complaint) *and to all whom it may concern*;

Take notice that (plaintiff) has commenced in this Court an action for permission to foreclose a mortgage on the premises located at (address of mortgaged premises) by the exercise of a power of sale as more fully described in the complaint served upon you herewith. If you wish to assert any defense to such foreclosure or any right under the Soldiers' and Sailors' Relief Act of 1940, as amended, you may file with the Court and serve upon

, the plaintiff's attorney, whose address is , an answer or other pleading stating the facts on which you claim that such foreclosure should not be permitted, on or before (not earlier than 14 days after service of notice). If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint, and the plaintiff will be permitted to proceed to foreclose the mortgage.

WITNESS

, Esquire

Judge of this Court, this day of 19 .
(Seal)

This notice issued pursuant to Massachusetts General Laws chapter 244, Sec. 17D.

(c.) (1) Service upon the record owner of the equity of redemption shall be made by personal service as provided by Rule 4 of the Massachusetts Rules of Civil Procedure, as the same may be from time to time amended.

(2) Service upon any other defendant may be made by personal service or by mailing copies of the complaint and notice to such defendant, registered or certified mail, return receipt requested, at such defendant's address last known to the plaintiff. Service made by mail shall be deemed made when mailed.

(3) A copy of the notice shall be published at least once not less than twenty-one days before the date for filing responsive pleadings as specified therein, in a newspaper published in the city or town or, if no such newspaper is published in the city or town, in the county in which any part or all of the real estate is located. In addition, a copy of the notice shall be recorded or registered in each registry of deeds and in each registry district in which the mortgage is recorded at least twenty-one days before the date for filing responsive pleadings as specified therein.

(4) If the person making service on any defendant as provided in subparagraph (1) or (2) of this paragraph (c.) makes return that after diligent search he cannot find the defendant nor the defendant's last and usual abode nor any other person upon whom service can be made, or that he can find no address at which service may be made by mail or that service by mail was refused, the publication provided by paragraph (3) shall be deemed sufficient service upon such defendant. Failure to serve any person or to publish or record the notice shall not affect the validity of the proceedings as to any person duly served.

Section 17E. Responsive Pleadings

(a.) On or before the date specified in the notice prescribed by Seventeen D, every defendant shall serve upon the plaintiff and file with the Court an answer admitting or denying the several allegations of the complaint and containing a short and plain statement of any facts upon which the defendant claims that foreclosure should not be permitted. The answer may state as a counterclaim any claim for relief the Court has power to give which at the time of serving the answer the defendant has against any plaintiff, if it arises out of the making or performance of the mortgage that is the subject of the plaintiff's claim. No other counterclaim or cross-claim against any person shall be pleaded or heard; provided, however, that nothing in this section shall be deemed to alter or affect the right of any such defendant to bring a separate action on any such claim in any court of competent jurisdiction.

(b.) Notwithstanding any statute or rule of court, no default or judgment entered for failure to file an answer as required by this section may be vacated after the foreclosure sale held pursuant to such judgment, except upon a petition brought by the former owner of the equity of redemption in the court which entered such default or judgment and a showing by such former owner that service was not made upon him as provided in section Seventeen D and that he had no actual knowledge of the proceeding brought under section Seventeen C. In no event shall any such default or judgment be vacated unless notice of the petition to vacate is recorded or registered in the Registry of Deeds or the registry district in which the mortgage is recorded or registered, prior to (i) the transfer of title by the mortgage holder, or (ii) the expiration of six months after the foreclosure sale, whichever occurs first. Such notice shall set forth the names of the mortgagor and the mortgagee and the recording reference of the mortgage, shall contain a description of the real estate adequate for identification and shall give the name of the record owner of the property at the time of recording or registering such notice.

Section 17F. Rules of Procedure

In any action brought under the provisions of section Seventeen C, the procedure shall be governed by the following rules and by the rules of procedure applicable in the court in which such action is heard to the extent that such rules are not inconsistent with the provisions of this chapter.

(a.) Any discovery shall be completed within twenty-one days after the date of filing answers; provided, however, that the court may for good cause shown extend the time upon a motion filed and served not more than fourteen days after the time for filing answers.

(b.) The court may entertain motions for and may enter partial or final summary judgment for any party pursuant to the procedures provided in Rule 56 of the Massachusetts Rules of Civil Procedure, as the same may be from time to time amended. The court may make such interlocutory orders as it finds necessary to preserve the condition of the property and the rights of the parties, including an order requiring the mortgagor or any of the responsible parties to pay any sums due under the mortgage from time to time and an order that the property be sold and proceeds paid into court; *provided*, that any motion for an order permitting sale before adjudication of default shall be accompanied by an affidavit setting forth specific facts supporting the conclusion that the condition or value of the real estate is in jeopardy. Any such sale shall not be considered a sale following a judgment, and shall not affect the rights of the parties in the proceeding under this chapter.

(c.) An action brought under the provisions of section Seventeen C shall be heard before any other pending actions except an action for injunctive relief or an earlier-filed action of the same kind brought under this chapter.

Section 17G. Judgment

(a.) If it appears that the plaintiff is entitled to exercise the power of sale granted in the mortgage, the court shall enter a judgment granting permission to foreclose.

(b.) If it appears that the defendant is entitled to the benefits of the Act of Congress known as the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, the court may make such other orders, including any order for stay or any judgment or order authorizing entry on and/or sale of the real estate, as may be necessary to comply with the provisions of the Act.

(c.) If it appears that the plaintiff is not entitled to foreclose, the court shall dismiss the complaint, and said dismissal shall bar any subsequent action under section Seventeen C based on defaults that are alleged or could properly have been alleged in the said complaint.

(d.) The court, in its discretion, shall have the right to assess double costs (which may include reasonable attorneys' fees) whenever it determines that a complaint was without merit or frivolously filed, or an answer or counterclaim was without merit or frivolously filed or filed for the purpose of delay.

Section 17H. Approval of Entry or Sale

(a.) A foreclosure effected by exercise of the power of sale pursuant to a judgment entered under paragraph (a.) of section Seventeen C or a foreclosure effected by sale or entry or otherwise pursuant to a judgment entered under paragraph (b.) of section Seventeen G may be approved by the court at any time after the expiration of the period for appeal from said judgment. There shall be no appeal from or exception from such approval.

(b.) The period of thirty days within which a copy of the notice of sale and the affidavit are required to be recorded by section Fifteen and the period of thirty days, (within which a memorandum or certificate of entry is required to be recorded by section Two) shall be computed from the time that the court approved the sale or entry as provided in this section.

SECTION 17I. Recording Judgment

A copy of the judgment permitting foreclosure and the approval thereof may be recorded or registered in the registry of deeds or registered, and if so recorded or registered shall be conclusive evidence of the plaintiff's right to foreclose and of

compliance with the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, as against all named defendants in the proceedings.

SECTION 17J. Waiver

The provisions of sections Seventeen A, Seventeen B, and paragraph (a.) of section Seventeen C shall not be waived, and any agreement to waive them or covenant not to rely upon them made before suit is commenced shall be void.

SECTION 4.

Chapter 244 of the General Laws is hereby amended by striking out Section 2 and inserting in place thereof the following section:

Section 2. Entry Without Judgment; Certificate; Recording

If an entry for breach of condition is made without a judgment, a certificate, under oath of the competent witnesses, shall be made in duplicate original. Once such duplicate original shall be mailed, by registered mail, to the owner of the equity of redemption of record as of the date of the entry within thirty days after the entry, the other duplicate original shall within thirty days of said entry, except as provided in Section Seventy of Chapter 185, be recorded in the Registry of Deeds for the county or district where the land lies together with an affidavit of the mortgagee that the duplicate original was mailed as aforesaid, stating the name of the addressee and the date of mailing, with a note of reference to the mortgage. Unless such record is made, the entry shall not be effectual for the purposes mentioned in the preceding section. The validity of the entry shall not be affected by the fact that the owner did not receive the duplicate original.

If the affidavit shows that the requirements of the statute have been complied with, the affidavit or a certified copy of the record thereof, shall be admitted as evidence that entry was duly made. In case of error or omission in an affidavit recorded as aforesaid an affidavit amending, correcting or in substitution may be approved and recorded as provided in Section 15 of this Chapter.

SECTION 5.

Chapter 140 of the General Laws is hereby amended by striking out Section 90B and inserting in place thereof the following section:

Section 90B. Home Mortgages; Effect of Failure to Specify Interest Rate

If any note secured by such a mortgage and any such mortgage does not, among its provisions, specify as separate items the principal sum, the rate of interest or its equivalent in

money, the period of the loan and the periodic due dates, if any, of principal and interest, and if, after the borrower or his authorized representative requests the lender to furnish him a copy of the note, by registered mail, the lender fails within fifteen days to so do, the lender shall have no right to collect interest thereon.

(B) ACQUISITION OF CERTAIN GRAVES BY
MUNICIPALITIES

HOUSE (1975) No. 1080

AN ACT PROVIDING THAT MUNICIPALITIES MAY
ACQUIRE CERTAIN GRAVES OF WHICH THE
OWNERSHIP IS UNKNOWN.

*Be it enacted by the Senate and House of Representatives in
General Court assembled, and by the authority of the same, as
follows:*

1 Chapter 114 of the General Laws is hereby amended by in-
2 serting after section 10 the following section:—

3 *Section 10A.* Any town may take over the ownership of a
4 grave in a cemetery established under section ten provided
5 that such grave has not been used for a period of fifty years
6 and provided further that the ownership thereof cannot be as-
7 certained. If such ownership is ascertained after such taking
8 the town shall pay the fair value of such grave at the time of
9 the taking to the owner thereof.

Ownership rights in a cemetery lot have been described both by statute and by decisional law. Chapter 114, § 29 of the General Laws provides in relevant part:

Lots in cemeteries incorporated under section one, tombs in public cemeteries in cities, and lots and tombs in public cemeteries in towns, shall be held indivisible, and upon the decease of a proprietor of such lot the title thereto shall vest in his heirs at law or devisees . . .

In *Messina v. Larosa*, 337 Mass. 438, 441, 150 N.E.2d 5, 7 (1958) the Supreme Judicial Court held that the proprietor of a cemetery lot is deemed to have “an easement or irrevocable license to use the lot for the burial of the dead so long as the place continues to be used as a cemetery.” The *Messina* case dealt with a “deed” of burial from a cemetery association.

The purpose of the proposed bill appears to be to provide a mechanism by which a town may assume ownership rights over abandoned cemetery lots after the passage of a specific period of time and where the ownership of the lot cannot be determined. It is noteworthy that House Bill 1080 draws no distinction between those graves in which there has been an interment and those which have never been used.

We do not recommend this bill.

The remedy provided by House Bill 1080 appears to be presently available under Chapter 204 § 12 of the General Laws. Section 12 provides in pertinent part that

The supreme judicial court, upon petition of a party interested and after notice . . . may make orders and decrees necessary to secure the rights of owners of, or of other persons claiming an interest in . . . tombs or lots in cemeteries.

Thus, it appears that a town could proceed under section 12 of Chapter 204 as a “person claiming an interest” in an abandoned cemetery lot.

(C) **CONVEYANCE OF LAND — NECESSITY OF
ACKNOWLEDGMENT BY GRANTEE**

HOUSE (1975) No. 1348

AN ACT REQUIRING A CERTIFICATE OF ACCEPTANCE OF A DEED AS A PREREQUISITE TO RECORDING.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

- 1 SECTION 1. Section 29 of chapter 183 of the General
- 2 Laws, as appearing in the Tercentenary Edition, is hereby
- 3 amended by adding the following paragraph: — No deed shall
- 4 be accepted for recording unless a duly acknowledged certificate of acceptance of delivery to the grantee is endorsed upon
- 5 or amended to it. A deed which is not in compliance with the
- 6 provisions of this paragraph shall not convey valid title.
- 7

HOUSE (1975) No. 4833

AN ACT PROVIDING THAT A DEED MUST BE SIGNED
BY THE GRANTEE AND ACKNOWLEDGED BE-
FORE A NOTARY PUBLIC.

*Be it enacted by the Senate and House of Representatives in
General Court assembled, and by the authority of the same, as
follows:*

- 1 Chapter 183 of the General Laws is hereby amended by
- 2 striking out section 6, as most recently amended by chapter
- 3 497 of the acts of 1969, and inserting in place thereof the fol-
- 4 lowing section: —
- 5 *Section 6.* Every deed presented for record shall contain or
- 6 have endorsed upon it the full name, residence and post office
- 7 address of the grantee, the signature of the grantee acknow-
- 8 ledged before a notary public, and a recital of the amount of
- 9 the full consideration thereof in dollars or the nature of the
- 10 other consideration therefor, if not delivered for a specific
- 11 monetary sum. The full consideration shall mean the total
- 12 price for the conveyance without deduction for any liens or
- 13 encumbrances assumed by the grantee or remaining thereon.
- 14 All such endorsements and recitals shall be recorded as part
- 15 of the deed. Failure to comply with this section shall not af-
- 16 fect the validity of any deed. No register of deeds shall accept
- 17 a deed for recording unless it is in compliance with the re-
- 18 quirements of this section.

It is provided in G.L. (Ter. Ed.) Ch. 183§ 29:

“No deed shall be recorded unless a certificate of its acknowledgment or of the proof of its due execution, made as hereinafter provided, is introduced upon or annexed to it, and such certificate shall be recorded at length with the deed to which it relates; but this section shall not apply to conveyances from the United States.”

There are some other methods of proof of the execution of deed but acknowledgement is most common. The form of acknowledgement for an individual is as follows:

On this first day of January 1976, before me personally appeared AB, to me known to be the person described in and who executed the forgoing instrument, and acknowledged the same as his free act and deed.

Notary Public

There is another form of acknowledgement in common use which says:

Then personally appeared before me the above named AB
and acknowledged the foregoing as his free act and deed.

Notary Public

The historical basis for acknowledgement can be traced directly to an act of the Great and General Court in October of 1640. The purpose of this act was to prevent fraud. The language is interesting.

SECT. 4. And for the avoiding all fraudulent conveyances, and that every man may know what estate or interest, other men may have in any houses, lands, or other hereditament, they are to deal in:

Sales to be
acknowledg-
ed and re-
corded.

Party refus-
ing to ac-
knowledge
his deed to
be imprisoned.

Grantee to
enter his
caution.

It is ordered by the authority of this court, that after the end of October, one thousand six hundred and forty, no mortgage, bargain, sale, or grant made, of any houses, lands, rents, or other hereditaments, where the grantor remains in possession, shall be of any force against other persons, except the grantor and his heirs, unless the same be acknowledged before some magistrate, and recorded, as is hereafter expressed; and that no such bargain, sale, or grant already made in way of mortgage, where the grantor remains in possession, shall be of force against other, but the grantor or his heirs, except the same shall be entered as is hereafter expressed within one month after the date before mentioned, if the party be within this jurisdiction, or elsewhere, within three months after he shall return; and if any such grantor, being required by the grantee, his heirs or assigns, to make an acknowledgment of any grants, sale, bargain, or mortgage by him made, shall refuse so to do, it shall be in the power of any magistrate to send for the party so refusing, and commit him to prison without bail or mainprise, until he shall acknowledge the same, and the grantee is to enter his caution with the recorder of the county court, and this shall save his interest in the mean time; and if it be doubtful whether it be the deed and grant of the party, he shall be bound with sureties to the next court of assistants, and the caution shall remain good as aforesaid. [October, 1640.]

The recent suggestion that the grantee acknowledge the deed is made for an entirely different reason. It is the apparent purpose of the proposed legislation to require acknowledgement by the grantee in order to demonstrate that he had accepted the deed voluntarily. A logical form of such acceptance would be as follows:

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

January 1, 1976

Then personally appeared the above-named John Buyer, grantee in the above instrument, and acknowledged that he accepted delivery of the said instrument, and that such acceptance of delivery was his free act and deed.

Before me:

John Hancock
Notary Public

My commission expires July 4, 1976

A requirement that the grantee acknowledge a deed will further complicate the business of transferring property and interests in property. There may be some few cases in the course of a decade in the entire Commonwealth when such a procedure would be valuable.

The cost in time and effort weighed against the possible benefits leaves no doubt whatsoever that a procedure which requires the grantee to acknowledge a deed is impracticable and unnecessary.

We do not recommend this bill.

(D) TENANCIES OF TWO OR MORE
IN PERSONAL PROPERTY

HOUSE (1975) No. 3154

AN ACT CLARIFYING THE LAW RESPECTING
TENANCIES OF TWO OR MORE IN PERSONAL
PROPERTY.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Section 7 of Chapter 184 of the General
2 Laws, as last amended by Chapter 210 of the Acts of 1973, is
3 hereby further amended by striking said Section 7 as now
4 constituted and by substituting the following:—

5 A conveyance, devise or other transfer of real or personal
6 property to two or more persons or to a husband and wife,

except a mortgage or transfer in trust, shall create an estate in common and not in joint tenancy, unless it is expressed in such conveyance, devise or other transfer that the grantee, devisee or other transferee shall take jointly, or as joint tenants, or in joint tenancy, or to them and the survivor of them, or unless it manifestly appears from the tenor of the instrument that it was intended to create an estate in joint tenancy.

A conveyance, devise or other transfer of real or personal property to a husband and wife which expressly states that the transferees shall take jointly, or as joint tenants, or in joint tenancy, or to them and the survivor of them shall create an estate in joint tenancy and not a tenancy by the entirety, but a conveyance, devise or other transfer to a husband and wife shall, if the instrument evidencing the transfer expressly so states, vest in the transferees a tenancy by the entirety.

In a conveyance, devise or other transfer to three or more persons, words creating a joint tenancy shall be construed as applying to all of the transferees, regardless of marital status, unless a contrary intent appears from the tenor of the instrument.

SECTION 2. Section 8 of Chapter 184 of the General Laws is hereby amended by striking said Section 8 as now constituted and by substituting the following:—

Real and personal property, including any interest therein, may be transferred by a person to himself jointly with another person in the same manner in which it might be transferred by him to another person, and a transfer of real or personal property by a person to himself and his spouse as tenants by the entirety shall create a tenancy by the entirety.

SECTION 3. The provisions of Section 1 and Section 2, as they pertain to the transfers of personal property, shall apply to transfers made after the effective date thereof.

Under existing law, a conveyance or devise of real estate to a husband and wife creates a tenancy in common. A joint tenancy is not created unless expressly stated. Where a conveyance or a devise is made to a husband and wife, and it is specifically provided that a joint tenancy is intended, a tenancy by the entirety is not created. *See*: Chapter 184, § 7 of the General Laws. By § 8 of Chapter 184, a person may create a tenancy by the entirety in real estate in himself and his spouse.

At common law “(j)oint ownership of real or personal property with right of survivorship created by a transfer to husband and wife is presumably a tenancy by entirety . . .” *Splaine v. Morrissey*, 282 Mass. 217, 221 (1933). Section 7 of Chapter 184, changed this common law rule with respect to transfers of *real*

property to a married couple. However, the presumption that personal property, transferred to a husband and wife is held by a tenancy by the entirety has not been modified by statute.

Several cases hold that in the absence of language to the contrary, a transfer of personal property to a husband and wife creates a tenancy by the entirety. *See: Smith v. Tipping*, 349 Mass. 590, 592 (1965); *Finn v. Finn*, 348 Mass. 443, 446 (1965); *Woodward v. Woodard*, 216 Mass. 1, 3 (1913). In the *Finn* case, the Supreme Judicial court stated:

Under our decisions they (a husband and wife) could hold property, real or personal, as joint tenants, where such an intention was unmistakably shown. Absent a clear showing that a joint tenancy was intended, however, a husband and wife hold property as tenants by the entirety.

H. 3154 is designed to eliminate any presumption that personal property is held by a married couple as tenants by the entirety. Furthermore, H. 3154 would amend § 8 of Chapter 184 to provide that a person may transfer personal property to himself and his spouse as tenants by the entirety if such is that person's intention.

We favor the enactment of this bill.

The continuing validity of a common law presumption that personalty transferred to a husband and wife creates a tenancy by the entirety causes confusion and is unnecessary. There is no sound reason why there should be two different presumptions for the ownership of real and personal property. H. 3154 removes a potential source of confusion and we therefore recommend it.

V. CIVIL ACTIONS AND PRACTICE IN THE COURTS

- A. Unauthorized Practice of Law — Credit Counselling Corporations.
- B. Consumer's Council — Authority to Pursue Civil Remedies.
- C. Action to Reach and Apply.

(A) UNAUTHORIZED PRACTICE OF LAW — CREDIT COUNSELLING CORPORATION

HOUSE (1975) No. 1153

AN ACT REPEALING AN AUTHORIZATION OF CREDIT COUNSELING CORPORATION TO ENGAGE IN THE PRACTICE OF LAW.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

- 1 Chapter 221 Section 46D of the General Laws is hereby
- 2 repealed.

In 1969, the General Court enacted the following statute, G. L. c. 221 § 46D which reads as follows:

§ 46D. Applicability to Nonprofit Credit Counseling Service Corporations of Certain Statutes Limiting Practice of law.

The provisions of sections forty-six, forty-six A, forty-six B and forty-six C shall not apply to a corporation, or its agents, which has been organized under the provisions of chapter one hundred and eighty for the purpose of providing credit counseling. (1969, 421, § 1.)

The purpose of this statute was to express legislative opinion that a non-profit corporation engaging in the activities of credit counseling would not be subject to prosecution for unauthorized practice of law.

The General Court has the clear right to provide penalties for those who involve themselves in the unauthorized practice of law, and to provide judicial procedures for dealing with this problem. Such is the effect of G.L. c. 221, § 46A and B. There is a special

provision in the statutes, c. 221 § 46C, which declares that the practice of debt pooling shall be deemed to be the practice of law. It has been held in *Home Budget Service, Inc. v. Boston Bar Association*, 335 Mass. 228 at 233:

“The statute here assailed is not unconstitutional as an interference with the purely judicial function to determine who may practice law but is a valid enactment in aid of the court’s power to make such a determination.”

We are of the opinion that c. 221 § 46D should be repealed. It does not in any sense serve “in aid of the court’s power to make” a determination of what is and what is not the practice of law.

In 1935, in an Opinion of the Justices to the Senate, 289 Mass. 607 the Supreme Judicial Court said specifically:

It is inherent in the judicial department of government under the Constitution to control the practice of the law, the admission to the bar of persons found qualified to act as attorneys at law and the removal from that position of those once admitted and found to be unfaithful to their trust. While the judicial department cannot be circumscribed or restricted in the performance of these duties, appropriate and essential assistance in discharging them may be afforded by the enactment of statutes. As the questions are framed and as a general proposition, valid permission to practice law cannot be given by the General Court except subject to the requirements for admission to the bar established by the judicial department. *Opinion of the Justices*, 279 Mass. 607.

So far as the practice of the law relates to the performance of the functions of an attorney or counsellor at law before the courts, it comprises mastery of the facts and law constituting the cause of action or legal proceeding of whatever nature, the preparation of pleadings, process, and other papers incident to such action or proceeding, and the management and trial of the action or proceeding on behalf of clients before judicial tribunals. These matters closely concern the courts. Legislation forbidding such practice of the law by corporations or associations, or by individuals other than members of the bar, would be within the competency of the General Court. It would tend to enhance the effectiveness of the judicial department. Crimes might be established for the infraction of prohibitions of such practice of the law. G. L. (Ter. Ed.) c.221, § 41. *Commonwealth v. Grant*, 201 Mass. 458. Civil remedies in equity or otherwise for the prevention of such infractions might be provided and made plain.

It would not be within the competency of the General Court to enact legislation designed to permit such practice of the law “by corporations or associations or by individuals

other than members of the bar of the Commonwealth." Permission to practice law is within the exclusive cognizance of the judicial department.

If § 46D is not unconstitutional, and it probably is, it is totally unnecessary since G.L. Ch. 180 § 4 and § 4A authorizes non-profit corporations to be organized to provide "non-profit credit counseling services." We do not interpret Ch 180 § 4A as a statute permitting anyone except an attorney to practice law.

In an appropriate case, the court may entertain proceedings to stop unauthorized practice, in addition to proceedings specifically authorized in Ch. 221. In the case of *Lowell Bar Association v. Loeb* 315 Mass. 176 at page 180, the Supreme Judicial Court said:

"The Judicial Department is necessarily the sole arbiter of what constitutes the practice of law."

The Credit Counseling Plan

Credit counseling is a social service rendered to that segment of the public which finds it difficult to manage their household expenses. In Massachusetts the movement for credit counseling was initiated by the large department stores. Customers would incur charge accounts beyond their ability to pay. In many instances a social worker with some common sense in the field of practical economics might give counsel and guidance to the individual and suggest a way out of the mess. This sort of counseling is not the practice of law.

Credit counseling was presented as a public service. It was suggested in the beginning that the cost of the service would be borne by the merchants as a cost of doing business. Non-profit corporations were organized first in Boston; then in Springfield to carry on the credit counseling function. This service is being given in many states, particularly in large metropolitan retail marketing areas. If credit counseling stopped here, it would not be a problem of unauthorized practice of law.

Credit counseling purposes involved arranging the finances of individuals who have overextended themselves and drawing up a plan which is in reality an assignment for the benefit of creditors. The various persons to whom money is owed are contacted and are asked to approve a plan for re-payment. If approval is obtained, periodic payments on account are made to each of the stores or other creditors.

We are informed that at least in the case of the credit counseling service in Boston, part of the funds coming from the debtor, or a percentage of the account involved is retained by the credit counseling organization as a fee. This is not the form of credit counseling which was originally represented to the public. It is not a mere isolated case or something which happens infrequently to some extent; it is a common pattern of credit counseling.

There is a clear conflict of interest present in credit counseling. If the merchants subsidize the service, there is bound to be a sense of loyalty to their interests even if such allegiance is unintentional. Some persons who become strangled in financial difficulty would do better to resort to the Federal Bankruptcy Court where they could file a wage earner petition and obtain all the protection of the Bankruptcy Act.

We do not attack credit counseling as a social service, but the practice of credit counseling as it exists today has become involved in the gray area of unauthorized practice of law.

Ethical Considerations

Cannon 3 of the Code of Professional Responsibility or Cannon of Ethics binding on the legal profession states:

“A lawyer should assist in preventing the unauthorized practice of law.”

Under disciplinary rule, D.R. 3-101(A) “a lawyer should not aid a non lawyer in the unauthorized practice of law.”

There are many legal assistance offices where people may turn for a lawyer even if they have no funds to pay. It is here or at the office of the lawyer of his choice that they should receive legal service. The lawyer may very well suggest a social agency which is free of conflict and which can impartially advise on household economy matters. The two functions, the practice of law and the counseling on economy matters, are distinct, and if the public is to be protected they should remain distinct. If c. 221 §46D merely preserves confusion, we think it is well to repeal it.

(B) CONSUMER'S COUNCIL — AUTHORITY TO PURSUE
CIVIL REMEDIES

HOUSE (1975) No. 6019

AN ACT ENABLING THE CONSUMERS' COUNCIL TO
SEEK CIVIL REMEDIES.. *Be it enacted by the Senate
and House of Representatives in General Court assembled, and
by the authority of the same, as follows:*

1 Section 115 of chapter 6 of the General Laws, as appearing
2 in section 2 of chapter 773 of the acts of 1963, is hereby
3 amended by inserting in the second paragraph after the first
4 sentence, the following new sentences: — Whenever the
5 council, through its investigations and studies, discovers any
6 violations of laws or regulations affecting consumers, it shall
7 be deemed a person for the purposes of section 9 of chapter
8 ninety-three A, and shall not be subject to the requirement of
9 suffering a loss of money or property if said requirement
10 would defeat the public interest; provided that, prior to com-
11 mencing action, the council shall notify the attorney general
12 who shall within fourteen days indicate to the council that
13 judicial proceedings will be brought pursuant to section four
14 of chapter ninety-three A. The council shall not proceed
15 under section nine of chapter ninety-three A if the attorney
16 general initiates judicial proceedings within sixty days of said
17 notice by the council.

The scope of the duties of the Consumers' Council is defined by Ch. 6, §115 of the General Laws. The Council is authorized to "conduct studies, investigations, and research" in the area of consumer affairs and to notify the governor and the attorney general of violations of law affecting consumer interests. Pursuant to Ch. 6, §115, the Council is also authorized to appear before any hearing on any matter affecting the consuming public. The Council is specifically designated as "an aggrieved party for the purpose of judicial or administrative review of any decision or ruling in any . . . proceeding in which it has . . . appeared . . ."

By Ch. 6, §115A, added by St. 1970, c. 885, §1, the Consumers' Council is authorized to adopt and promulgate rules and regulations with respect to "unit pricing" of packaged consumer goods.

Proposed House bill 6019 seeks to greatly expand the authority of the Consumer's Council by permitting it to initiate civil actions

under Ch. 93A. We are strongly opposed to this bill, and we do not recommend it.

The attorney general is authorized pursuant to §4 of Ch. 93A of the General Laws to commence actions against unlawful or deceptive practices. The attorney general's office possesses the resources to make an informed judgment of whether such actions are necessary and are in the public interest. Moreover, the attorney general and his staff are in a much better position than is the Consumer's Council to make a determination of whether the best interests of the consuming public would be served by an action under Ch. 93A. The office of the attorney general is involved in all phases of the administration of justice and, as a result, has the advantage of an overview of the entire system. We favor keeping the initiation of proceedings under Ch. 93A within the sound and well-exercised discretion of the attorney general.

The enactment of House bill 6019 would result in an unnecessary duplication of a function already delegated to the attorney general, and we, therefore, do not recommend it.

(C) ACTION TO REACH AND APPLY

HOUSE (1975) No. 2965

In the Year One Thousand Nine Hundred and Seventy-Five.

AN ACT FURTHER DEFINING ATTACHMENTS OF EQUITABLE INTERESTS.

Be it enacted by the Senate and House o Representatives in General Court assembled, and by the authority of the same, as follows:

- 1 Subsection 7 of section 3 of chapter 213 of the General
- 2 Laws is hereby amended by adding the following sentence:—
- 3 For purposes of this section a debt shall include any legal lia-
- 4 bility, whether matured or unmatured, liquidated or unliquid-
- 5 ated, absolute, fixed or contingent.

We do not recommend this bill.

At the outset, it should be mentioned that Chapter 1114 of the Acts of 1973 amended MGLA, Ch. 214, §3 such that the former

subsection (7) of §3 is now subsection (6). House Bill Number 2965 also refers to MGLA, Ch. 213; this is incorrect and should read as Ch. 214.

Our language of this bill is taken from the definition of a "Debt" which is found in G.L. (Ter. Ed.) Ch. 109A, §1. This is the Uniform Fraudulent Conveyance Act. The purpose of this act is to give a creditor complete and speedy relief against his *fraudulent* debtor. It is important to keep in mind that normal business dealings which are free from fraud do not come under this act.

The definition of debt in the Uniform Fraudulent Conveyance Act, therefore, has significance which may not necessarily be applicable under other statutes.

The proposed act (H. 2965) would amend the statutes which confer Equity jurisdiction on the courts. The particular type of Equity jurisdiction here involved is the well-known and traditional "Bill to reach and apply." Under this procedure a complaint may be filed to reach any property, right, title, or interest, legal or equitable, which the debtor may have and which can not be reached directly to satisfy the "debt." Under the statute shares in corporations can be reached and applied as well as other property, including obligations of insurance companies.

It is said that this bill would correct any confusion concerning the word debt. But the proposed legislation would do far more than that. It would eliminate the distinction between property or interest which were fraudulently conveyed to avoid a debt and property or interests which were involved in normal and non-fraudulent situations.

We do not believe that the definition of the word "debt" in the Uniform Fraudulent Conveyance law should be carried over to Ch. 214, which deals with general Equity jurisdiction. The cases of *Oppenheim v. Bloom*, 325 Mass. 301 (1950); and *Bressler v. Averbuck*, 322 Mass. 139, to some degree exhibit the attempts of the courts to interpret the term "debt" in Ch. 214, §3 (6). In *Garsson v. American Diesel Engine Corp.* 310 Mass. 618 (1942), the court was called upon to determine whether the failure of the defendant to issue its note to the plaintiff, as promised under a settlement agreement, amounted to a debt. Due to the particular facts of the case, the court decided that a debt had been established for purposes of Ch. 214, §3 (6).

In *Bressler* the court said that an obligation due from defendant under MGLA, Ch. 137, §1 (gambling losses) constituted a "debt" within the meaning of MGLA, Ch. 214, §3(6).

The proposed language of House Bill 2965 goes beyond the purpose of clarifying the term "debt" in that it would significantly expand that term to include such things as "any legal liability" even if it was not liquidated or fixed. The traditional view of a "debt" under Ch. 214, §3 (6), regardless of any past confusion, has at least apparently been an obligation which is fixed or liquidated. The proposed definition would certainly go beyond this. *Kilbourne Co. v. Standard Stamp Affixer Co.*, 216 Mass. 118 (1913) contains an analysis of the term "debt." In that case, the court said, quoting from *Pettibone v. Toledo, Cincinnati, & St. Louis Railroad*, 148 Mass. 411, 416-417, that the purpose of the bill to reach and apply was to afford relief to "creditors who have obtained judgments at law, and who have in vain attempted at law to obtain satisfaction of the judgments, and who sue in equity for the purpose of reaching property which could not be taken on execution at law." The court further stated that a "debt" does not include the "simple possibility of being found responsible in damages for the breach of an executory contract where neither the fact of liability nor the amount can be held affirmatively to exist until a judgment shall have been recovered." It would appear, however, that by defining "debt" as provided in House Bill 2965 that term in Ch. 214, §3 (6) would take on a meaning not heretofore recognized.

We are unwilling to expand to this extent the current limits of the equitable complaint to reach and apply. We believe that it would be unwise to enact the proposed bill.

**DRAFT ACTS RECOMMENDED
TO THE 1976 GENERAL COURT**

Subject Matter	Page In This Report
Legislative Amendment to the Constitution Relative to Discipline, Censure, and Removal of Judges	12
Exclusion of the Public From Trials of Certain Sex Offenses	51
Judicial Procedure for the Foreclosure of Real Estate Mortgages	139

— NOTES —

— NOTES —

JUDICIAL COUNCIL OF MASSACHUSETTS



52nd REPORT 1976

JUDICIAL SYSTEM REORGANIZATION
PROCEEDINGS FOR THE CARE AND
PROTECTION OF CHILDREN
UNIFORM CHILD CUSTODY JURISDICTION ACT

MEMBERS OF THE COUNCIL (APRIL 1977)

JACOB J. SPIEGEL *of Boston*, CHAIRMAN
JAMES L. VALLELY *of West Newton*, VICE CHAIRMAN*
THOMAS D. BURNS *of North Andover*
CLIFFORD E. ELIAS *of Andover*
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WILLIAM I. RANDALL *of Framingham*
PAUL T. SMITH *of Boston*
BERGE TASHJIAN *of Westboro*

JAMES B. MULDOON *of Weston*, Secretary
Two Center Plaza, Boston, Mass. 02108

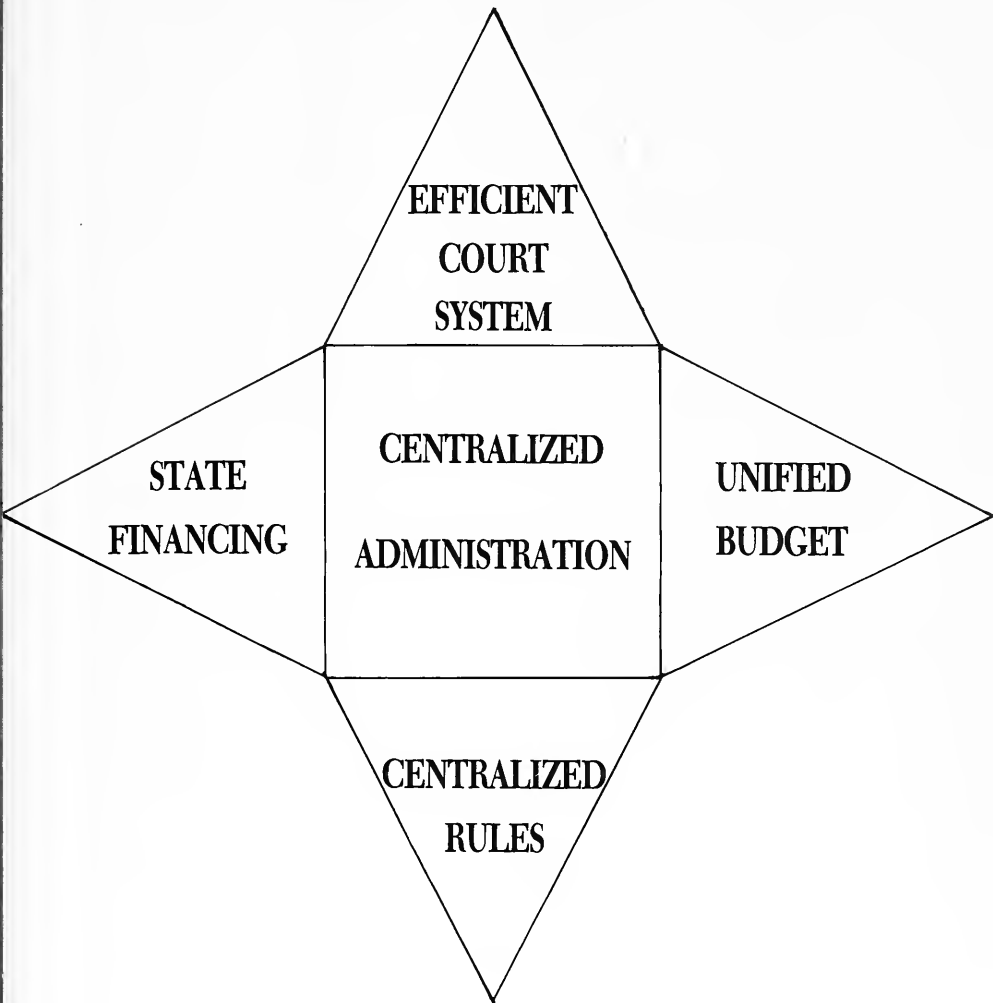
INQUIRIES CONCERNING THE JUDICIAL COUNCIL

This report is distributed by the Public Document Room at the State House in Boston. Copies are sent to all members of the legislature, judges, clerks of court, libraries, city and town clerks, and many others. As long as the supply lasts, copies of this report and also copies of some earlier reports can be obtained, without charge, by requesting them from the Public Document Room, State House, Boston, Massachusetts 02133.

Persons interested in matters under consideration by the Judicial Council and in the improvement of the judicial system of the Commonwealth are invited to communicate with the Secretary of the Judicial Council, James B. Muldoon, 2 Center Plaza, Boston, Massachusetts 02108.

*Thomas R. Morse, Jr., an Associate Justice of the Superior Court, became a member of the Judicial Council on May 9, 1977 replacing the Honorable James L. Vallely.

THE UNIFICATION CONCEPT



This figure demonstrates the concept of a unified court structure as has been proposed for the Massachusetts judicial system.



52nd REPORT

Judicial Council of Massachusetts —1976—

CONTENTS OF THIS REPORT

THE ACT CREATING THE JUDICIAL COUNCIL	6
MEMBERSHIP OF THE JUDICIAL COUNCIL	inside cover
TABLE OF LEGISLATION REFERRED TO THE JUDICIAL COUNCIL IN 1976	7
I. GENERAL OBSERVATIONS ON THE JUDICIAL SYSTEM	9
A. Introduction	9
B. Beware Brinksmanship	12
C. Court Organization and Financing	12
1. Assumption of Financial Support by the Commonwealth	12
2. Responsibility for the Judicial Budget	16
3. Enlarging the Staff and Mission of the Executive Secretary of the Supreme Judicial Court	17
4. Judicial Manpower	19
D. Unification of the Trial Courts	21
1. Philosophy of Unification	21
2. The Probate Court and Its Mission	27
3. The Land Court and Its Mission	33
4. The Housing Court and Its Mission	39
5. The Superior Court	41
6. Recommendations of the Judicial Council	43

E. Consolidation of the District Courts	50
1. New Status of the District Courts	50
2. The Consolidation Plan to include the Boston Municipal Court	52
3. Expansion of the Jurisdiction of the District Court	53
4. Regional Divisions of the District Courts	54
5. Jurisdictional Boundaries of District Courts	55
6. Certification of District Court Judges to sit in Superior Court	56
F. Judicial Policy Making and Administration	56
1. The role of the Chief Justice of the Supreme Judicial Court as Manager of the Judicial System	56
2. The Management of the Superior Court, the Land Court, the Probate Court and the Housing Courts	61
3. The Regional Administrator Concept	62
G. Management of Criminal Business in District Court	62
1. Trials by Jury of Six in Criminal Cases	62
2. Elimination of the Trial De Novo	63
3. Decriminalization of Minor Motor Vehicle Offenses	64
4. Non-Support Complaints	65
H. Management of Civil Business in District Court	67
1. Trials by a Jury of Six in Civil Cases	67
2. Consumer Cases under Chapter 93A, under \$10,000.00	68
3. Equity Appeals in Zoning Cases	69
I. Case Management and Rules of Procedure	70
II. JUVENILE PROCEDURE AND PRACTICE	84
A. Children in Need of Care and Protection — Revision of Procedures	84
B. Disposition of Care and Protection Hearings	88
C. Emergency Court Orders	94
D. Evidentiary Procedures	97

III. PROBATE 100

 A. Adoption: Right to Inspect the Record —
 Adopted Person 100

 B. Adoption: Death of Husband or Wife Petitioner 102

 C. Custody — The Uniform Child Custody
 Jurisdiction Act 104

 D. Joint Legal Custody 118

 E. Illegitimate Children — Custody and Support Decrees . . 120

 F. Illegitimate Children — General Policy 122

IV. CRIMINAL LAW AND PROCEDURE 126

 A. Portrayal of Cruelty to Animals 126

 B. The Elderly and Violent Crimes 129

 C. Evasion of Fares 130

 D. Wrongful Death of Child — Notice to Parents 131



The Commonwealth of Massachusetts

April, 1977

THE HONORABLE MICHAEL S. DUKAKIS
Governor of Massachusetts

Dear Governor Dukakis:

In accordance with the provisions of Chapter 221, Section 34A of the General Laws, we have the honor to transmit the fifty-second report of the Judicial Council for the year 1976.

JACOB J. SPIEGEL, CHAIRMAN
JAMES L. VALLELY, VICE CHAIRMAN*
THOMAS D. BURNS
CLIFFORD E. ELIAS
LAWRENCE F. FELONEY
JACOB LEWITON
ALFRED L. PODOLSKI
WILLIAM I. RANDALL
PAUL T. SMITH
BERGE TASHJIAN

*Thomas R. Morse, Jr., an Associate Justice of the Superior Court, became a member of the Judicial Council on May 9, 1977 replacing the Honorable James L. Vallely.

JUDICIAL COUNCIL

G.L. (Ter. Ed.) Chapter 221, §§34A-34C

The Judicial Council Was Established To Make A Continuous Independent Study Of The Organization, Procedure, And Practice Of The Courts.

The Council Makes Recommendations Requested By The Legislature And Suggests Improvements In The Administration Of Justice.

Statutory Authority

Section 34A. There shall be a Judicial Council for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the Commonwealth, the work accomplished, and the results produced by that system and its various parts. Said council shall be composed of the chief justice of the supreme judicial court or some other justice or former justice of that court appointed from time to time by him; the chief justice of the superior court or some other justice or former justice of that court appointed from time to time by him; the judge of the land court or some other judge or former judge of that court appointed from time to time by him; the chief justice of the municipal court of the city of Boston or some other justice or former justice of that court appointed from time to time by him; one judge of a probate court in the Commonwealth and one justice of a district court in the Commonwealth and not more than four members of the bar all to be appointed by the governor, with the advice and consent of the executive council. The appointment by the governor shall be for such periods not exceeding four years, as he shall determine.

Section 34B. The Judicial Council shall report annually on or before December first to the governor upon the work of the various branches of the judicial system. Said council may also from time to time submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable.

Section 34C. No member of said council, except as hereinafter provided, shall receive any compensation for his services, but said council and the several members thereof shall be allowed from the state treasury out of any appropriation made for the purpose such expenses for clerical and other services, travel and incidentals as the governor and council shall approve. The secretary of said council, whether or not a member thereof, shall receive from the Commonwealth a salary of ten thousand dollars.

1976 HOUSE AND SENATE BILLS REFERRED TO THE JUDICIAL COUNCIL

1976 Bill Number	1976 Resolve Chapter	Subject Matter	Page In This Report
S 607	12	An Act relative to proceedings of children in need of care and protection	88
S 608	12	An Act relative to the admission of evidence in care and protection proceedings	97
S 609	12	An Act relative to emergency court orders transferring custody of children	94
S 610	12	An Act relative to definitions and procedures in proceedings of children in need of care and protection	84
S 702	12	An Act relative to giving notice to the parents of minor children who have been killed	131
H 306	13	An Act relative to the sharing of custody, visitation and support of children	119
H 703	12	An Act relative to increasing penalties for the commission of violent crimes upon elderly people	129
H 984	12	An Act relative to the evasion of payment of a fare	130
H 1587	12	An Act to discourage cruelty to animals in the production of commercial visual entertainment materials	126
H 1784	13	An Act permitting the Probate Court to order joint legal custody of children . . .	118
H 1951	13	An Act relative to the fiscal, budgetary and administrative procedures of the District Courts	56 (Footnote)
H 3436	12	An Act amending the laws pertaining to illegitimate children	122
H 3452	12	An Act relative to permitting an adopted person to obtain information of his or her adoption upon reaching the age of twenty-one	100

1976 Bill Number	1976 Resolve Chapter	Subject Matter	Page In This Report
H 3858	12	An Act relative to the status of a husband or wife who petitions for adoption and dies before it is allowed	102
H 4028	13	A Resolve providing for an investigation by the Judicial Council relative to the feasibility of adopting the Child Custody Jurisdiction Law	104
H 4168	12	An Act relative to the power of the Probate Courts to make decrees concerning the care, custody, education and maintenance of illegitimate children	120

I.

GENERAL OBSERVATIONS ON THE JUDICIAL SYSTEM

A. INTRODUCTION

THE REORGANIZATION PROPOSALS FOR THE MASSACHUSETTS JUDICIAL SYSTEM

As far back as 1906, Roscoe Pound advocated a philosophy of unification for the American judicial system. In 1940, he published a paper entitled "Principles and Outlines of Modern Unified Court Organization". In 1949, Chief Justice Arthur T. Vanderbilt's "Minimum Standards of Judicial Administration" was published. In the 20 years which followed, there were many studies pertaining to the unification of trial courts. Some of them recommended a total unification of all trial courts, while others recommended a two-tier system. By 1974, there was a division of opinion; and at the time of this report, there is still no unanimity of opinion.

Three publications of the American Bar Association have concentrated attention on court unification. These are:

American Bar Association "*Standards Relating to Court Organization*" (1974), on Court Unification;

American Bar Association "*Case Flow Management in Trial Court*" (1973);

American Bar Association "*Standards Relating to Trial Courts*" (July, 1976) on Judicial Administration and Procedure.

No state has completely adopted these standards or their predecessors, and yet, some states have accomplished substantial improvements in their judicial systems. All states must decide their priorities both from the point of view of public service and from the point of view of the realistic application of the tax revenues on which at least in Massachusetts there are such strong and diverse demands. We are clearly in the experimental stage in the inexact science of judicial administration.

More specific prior recommendations applicable only to Massachusetts are mentioned in the Report of the Select Committee. Among these are:

Massachusetts Courts, Summary and Recommendations (1976), an LEAA and Greater Boston Community Foundation funded study

by the Boston office of the National Center for State Courts, which has made several LEAA funded studies of the Massachusetts judicial system.

Final Report of the American Judicature Society on *Financing Massachusetts Courts*, January 15, 1974.

In December, 1976, the Report of the Governor's Select Committee on Judicial Needs was filed. Based on this Report, House No. 4400 was introduced in the General Court and referred to the Joint Committee on the Judiciary.

House No. 4400 calls for some major changes in the structure, organization, management and financing of the judicial system of the Commonwealth.

The Concept of Unification

Neither the Report of the Select Committee in 1976 nor House No. 4400 really demonstrates the guiding philosophy behind the 1977 proposals for court reorganization. The unification movement revolves around five points:

1. The so-called simplification of the court organization. Applied to Massachusetts, this reorganization calls for the Supreme Judicial Court, the Appeals Court, the Superior Court, and the District Court of Massachusetts. Some urge only one general trial court.
2. The rule making authority would be centered in the Supreme Judicial Court. If other courts promulgated rules, they would be subject to the approval of the Supreme Judicial Court. Such a procedure now exists in the Commonwealth since the adoption of the Massachusetts Rules of Civil and Appellate Procedures.
3. The management of the judicial system should be centralized under a chief court administrator with an adequate staff and facilities. The administrator would act within the limits of policy established by a Chief Justice or policy making group of judges.
4. The budget for the judicial system would be developed within the courts and submitted by the Chief Justice to the General Court. County appropriation for the operation of the judicial system would no longer be made.
5. The judicial system would be financed by the Commonwealth rather than the counties or local real estate taxpayers such as is now the case.

The Report of the Select Committee and the consideration of House No. 4400 cannot be well understood and debated without reference to the five point philosophy of unification.

The judicial system of the Commonwealth has been developed over a period of 350 years. The evolution of the judicial system in Massachusetts has brought forth a two-tier system. The District Court which deals with a large volume of cases of lesser magnitude than those in the Superior Court has done its job well. The Superior Court is a model of excellence throughout America, but it is overburdened.

We hope that impractical or unwise measures can be avoided. We are compelled, on the basis of our collective long experience with the judicial system of the Commonwealth, to reach a different conclusion in regard to some of the proposals of the American Bar Association standards as they apply to this Commonwealth. To the extent that these same ABA standards form the basis for some of the recommendations of the Select Committee, we necessarily must advise the Governor and the General Court that we see no real solution in such recommendations.

We are most gratified, however, to see that the Select Committee has recommended most of the "reform" package that we have espoused during the past generation, particularly the last decade. We reaffirm our previous position on such matters in this report of the Judicial Council.

There is little, apart from details, in the recommendations of the Select Committee which is new. However, they do serve to crystallize the thinking of many decades. The mere fact that similar recommendations were rejected by the General Court in the past does not necessitate the conclusion that they will also be rejected now.

The General Court is the only body under the Constitution of Massachusetts which can make the decision as to what kind of judicial system our Commonwealth will have. Most of the principles and philosophy underlying the excellent studies of judicial administration are in agreement. All persons of intelligence support in principle the programs guaranteeing the speedy delivery of justice to the consumer as fairly and impartially as the lot of man will admit. The achievement of this goal is the purpose of the various individuals, committees and agencies, including the Judicial Council, which have occupied the field.

However, even if the legislature were to adopt and implement the mosaic of programs thus far presented, there could be absolutely no guarantee to the consumer of justice, or to the Massachusetts taxpayer, that speedy delivery of justice would be accomplished. This is also the

Note: Judge Feloney dissents from the positions contained in this report which differ from the recommendations contained in the Report of the Select Committee on Judicial Needs, of which committee he was a member.

unfortunate weakness in some of the recommendations of the Select Committee, and we must make decisions with that in mind.

The Judicial Council is concerned with the preservation of an independent judiciary at all levels. Independence does not mean lack of professional responsibility. However, it does entail a good day's wage for a good day's work. The costs of reform, both direct and indirect, are of great concern to the Judicial Council, and are of equal concern to the Governor and the General Court. The mere juggling of the present inadequate personnel force and court facilities will inevitably result in a new form of inadequacy, and we cannot endorse this kind of solution.

B. BEWARE BRINKSMANSHIP

Massachusetts and its cities and towns (Boston in particular) stand on the brink of disaster not only with respect to the administration of justice, as the Select Committee says, but also in regard to public education, special education, housing, welfare costs, the care of the elderly persons, medical care, care of the mentally ill, the care and protection of children, the reshaping of young lives headed for destruction, public safety, and many other areas. The Governor and the General Court know that funds allocated for one important governmental function may have to be diverted, or that the citizens and businesses of the Commonwealth may have to pay increased taxes in order to better support an activity of the government which has previously been somewhat neglected.

Our comments and observations are made with a realistic approach and with the idea that a judicial system which has been in existence since 1620, and which is recognized as the finest in the United States in the quality of its justice, should not be needlessly subjected to any sudden or drastic changes or experiments. Necessary reforms must be introduced gradually as has been done in our District Courts under the administration of the late Chief Justice Flaschner (e.g., the general elimination of special justices in the District Courts).

In the matter of the number of judges necessary for the proper administration of justice in this Commonwealth, we do recommend drastic action forthwith. Justice can be dispensed in simple surroundings, or even in courthouses which have been officially labeled as fire-traps, but justice cannot be dispensed without judges.

C. COURT ORGANIZATION AND FINANCING

1. Assumption of Financial Support by the Commonwealth

In the 19th Report of the Executive Secretary of the Supreme

Judicial Court, (p. 6) the allocation of expense for the judicial system is as follows:

Federal Share	3.1 Million	3%
State Share	18.6 Million	19%
County Share	<u>77.3 Million</u>	<u>78%</u>
Total	99.0 Million	100%

About \$18 million in income was received by the judicial system during this fiscal year, thus reducing the net cost of operating the courts to about \$81 million.

Of the county share, Suffolk County pays about \$21 million and Middlesex County pays about \$17 million. These counties pay a total of \$38.4 million, or almost half of the entire county share. The city of Boston and other metropolitan-area communities should not be required to continue to pay such a large share of the expense of the judicial system. The state must assume this burden.

Under the existing system the real estate taxpayer in Boston, for example, underwrites far more of the cost for the judicial system than is justified by the benefits available to him. As in many other cases, the services of the Suffolk County courts are utilized by the metropolitan area in which the largest segment of the Massachusetts population lives. It is thus appropriate for this population segment, and in fact the Commonwealth as a whole, to pay these costs.

The elimination of special justices, and the consequent increase of full time District Court judges, will increase the cost to counties and local taxpayers.

The Select Committee has recommended a single budget. The Judicial Council recommended this previously.

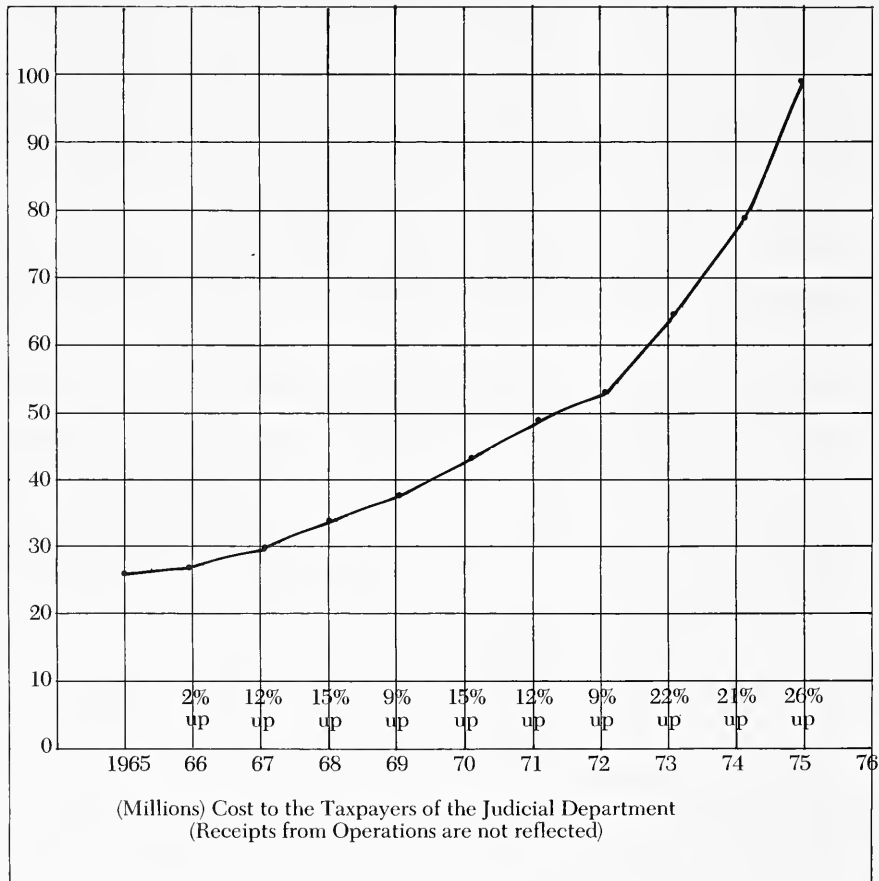
It has been pointed out that there are 417 separate budgets in the judicial branch. While we may all talk of converting this maze of budgets into a "single budget for all personnel and activities of the judicial system", we must be realistic. Each unit of whatever system we may have, must develop, if not its own budget, at least its own budget estimate. We should at least reduce the number of budgets to fewer than 417 and we must, in the view of the Judicial Council, employ a procedure wherein each member of a judicial sub-system channels its budget to the administrative office of the Chief Justice of that sub-system. Each division of the proposed District Court of Massachusetts, for example, would forward its budget request to the office of the Chief Justice of that new court. In like manner the budgets of the Superior Court and of the Probate Courts would be channeled to the administra-

tive offices of those courts and to their Chief Justices. This procedure would be used by all the other courts so that the annual budget for the entire judicial system could be assembled by the Executive Secretary of the Supreme Judicial Court, reviewed by the Supreme Judicial Court, and ultimately presented to the General Court.

Budget Allocations and Decisions

The 1974 Report on *Financing Massachusetts Courts* by the American Judicature Society states:

As a co-equal branch of government, the judiciary should be free to manage its own affairs. Although the power to determine how much money the court system can spend is vested properly in the legislative branch, once that determination has been made, the courts themselves should be free to determine how the money should be spent.



The following table indicates the County Court Appropriations for the fiscal year 1977.

TABLE NO. 1. Fiscal Year 1977 County Court Appropriations¹
(dollars in thousands)

County	1976 Chapter No.	Clerk of Courts	Law Libraries	Superior Court	Probate Court	District and Municipal Courts	Court Houses ²	Total
Barnstable	285	\$ 76	\$ 21	\$ 279	\$ 28	\$ 912	\$ 394	\$ 1,710
Berkshire	169	87	25	503	13	721	125	1,474
Bristol	403	316	29	1,064	53	2,220	521	4,203
Dukes	98	15	3	42	7	92	21	180
Essex	363	346	33	1,198	70	3,327	725	5,699
Franklin	122	51	20	212	9	324	79	695
Hampden	340	332	61	1,325	61	3,080	1,147	6,006
Hampshire	265	81	41	309	31	555	232	1,249
Middlesex	405	1,025	161	3,072	304	11,223	4,016	19,801
Nantucket	— ³	11	1	32	3	49		96
Norfolk	406	351	29	1,497	168	3,000	954	5,999
Plymouth	348	307	14	780	145	2,285	478	4,009
Suffolk	— ⁴	3,916	5	3,426	216	10,866	1,687	20,116
Worcester	426	509	74	1,185	55	4,131	823	6,777
Total		\$7,423	\$517	\$14,924	\$1,163	\$42,785	\$11,202	\$78,014

¹Does not include debt service, pensions, or group insurance; less Commonwealth reimbursements.

²Total cost, i.e. including registry buildings.

³1975 Expenditures, Annual Report of the Exec. Sec. of the S.J.C.

⁴From 1977 Suffolk County Budget.

Our Constitution requires that the Commonwealth, and not its political subdivisions, be responsible for the administration of justice throughout Massachusetts. Little attention has been paid to this constitutional principle in the 20th century.

While it is now true that the local real estate taxpayer is assessed, through the county, 78% of the cost of justice (and that assessment is by no means appropriately imposed), this is, as we have previously said, the result of a "historical accident".

The General Court cannot carry out its constitutional mandate "to erect and constitute judicatories" unless it also gives the courts the means to exist independently of county budgets and federal grants.

2. Responsibility for the Judicial Budget

Need for a Unified Budget

In our 50th Report (p. 49) we said that there should be a single budget for the judicial system. We mentioned the report of the American Judicature Society in 1974 *Financing Massachusetts Courts* in which it was stated:

The legislature should have the ultimate power to determine the total amount of money to be made available to the courts. However, once that determination is made, courts must be free to determine how that money is to be spent.

The American Judicature Society Report was directed toward the ideal that:

all the courts within a state should be funded from a single source to assure the most effective and uniform management and administration of the entire system.

The existing evils found by the American Judicature Society are:

1. Disparity in equipment, quarters, and personnel.
2. Necessity to resort to the "politics of the system" to get a more advantageous appropriation for the court.
3. "Rich" courts and "poor" courts.
4. Non-uniform procedures and standards.

Following this philosophy it becomes apparent that the best promise for the unified budget (and gradual state assumption of court costs) is to have the Chief Justice of each of the courts involved in the budgetary decision-making process.

It would not serve the needs of the Commonwealth to divert the necessary funds from one of the judicial sub-systems merely to enhance the budget of another. These sub-systems must be kept in balance because of the jurisdictional nature of the trial courts of the Commonwealth. The interrelation of these systems must be recognized in the

budget-making process. There will also be budgetary questions in the operation of the two appellate courts, but in view of the nature of these two courts, the impact of their budget should not be a major financial consideration.

From all this emerges the role of the Executive Secretary, or the chief court administrator, and his staff in the area of court financing. It is obvious that the General Court and the taxpayers expect efficiency and strict application to business by the judicial system. It is the Executive Secretary's staff which will work with the Chief Justices of the sub-systems to best allocate the expected appropriation by the General Court for the judicial department. This staff must be enlarged.

3. Enlarging the Staff and Mission of the Executive Secretary of the Supreme Judicial Court

The Executive Secretary of the Supreme Judicial Court has been given certain specific duties by the General Court under Chapter 211, Section 3C:

§3C. Executive secretary; duties. The executive secretary, subject to the direction and supervision of the justices of the supreme judicial court, shall perform the following functions and shall make reports and recommendations to the justices of the supreme judicial court relative thereto:

(a) Examination of the administrative methods, systems and activities, relating to their offices or employment, of the judges, clerks, registers, recorders, stenographic reporters, and employees of all courts of the Commonwealth and the offices connected therewith.

(b) Examination of the state of the dockets of the courts, securing information as to their needs for assistance, if any, and preparation of statistical data and reports of the business of the courts.

(c) Examination of the arrangements for accommodations for the use of the courts and the clerks, registers and recorders thereof, and the examination of the arrangements for the purchase, exchange, transfer and distribution of equipment and supplies therefor.

(d) Investigation and collection of statistical data relating to the expenditures of public moneys, state, county and municipal for the operation and maintenance of the courts and the offices connected therewith.

(e) Examination, from time to time, of the operation of the courts and investigation of complaints with respect thereto.

(f) Attendance to such matters necessary to carry out the provisions of this section and sections three D, three E, and three F as may be assigned by the justices of the Supreme Judicial Court. Added St. 1956, c. 707, §2.

In addition to these duties the Executive Secretary has the following role:

- (1) To collect information and statistical data bearing on the judicial system and to make an annual report together with his recommendations.
- (2) To act as secretary of the Judicial Conference.

Expansion of the Role

Assuming that the office of the Executive Secretary would be properly financed and staffed, we recommend that this office be responsible for the following functions, some of which are currently being attempted:

1. Maintenance of management standards and procedures for the personnel of the judicial system including recruitment, training, periodic review, promotion, transfer, professional education and discipline. This function would not apply to judicial officers.
2. Preparation of a budget for the judicial system after consultation with the chief justices of the sub-systems, and under the supervision of the chief justice of the Supreme Judicial Court.
3. Maintenance of audit procedures for the finance of the judicial system.
4. Maintenance of computerized reporting of statistics and case management, and other system data.
5. Management of a system-wide continuing education effort for all personnel of the system including judges.
6. Responsibility for the publication of uniform standards for statistical reporting.
7. Responsibility for the publication of a system-wide series of bulletins on the needs and progress of the administration of the judicial system.
8. Strengthening of the community relations office of the judicial system; establishing further relations with the executive and legislative branches and with the public.
9. Responsibility for advising the various levels of government, state, county and local, as to the needs and requirements of facilities planning; and the authority to withhold approval of new construction in the absence of compliance with needs.
10. Responsibility for efficient system-wide purchasing and printing.
11. Responsibility for acquisition and management of federal grants.
12. Executive authority over the Administrator's Office.
13. Responsibility for correlation of efforts of the judicial system and its branches in the field of new legislation.

14. System-wide planning, programming and research.
15. Responsibility for attendance at conferences and meetings in other jurisdictions, and for the exploration of ways and means for the better and more economic operation of the judicial system of the Commonwealth.

Other programs and activities of the Executive Secretary were described in our 51st Report for 1975 in which we said:

On review of the activities of the Executive Secretary, it appears that the office is in need of dramatic change. The need for an Executive Secretary or Administrator is obvious. As presently constituted, the office is understaffed and underequipped. It is possible that the Executive Secretary's office has overextended the few resources it has.

Despite the progress, the Executive Secretary is still not yet an efficient administrative arm of the Supreme Judicial Court. Thirty-six other jurisdictions have executive secretaries who have larger staffs than in Massachusetts. New Jersey has a staff of 89 and Connecticut has 40. Massachusetts ranks fifth in New England in state court administration.

The General Court must support the activities of this office and it will well serve the Commonwealth if the office is expanded and enlarged both in scope and personnel. Unification, and even reforms short of that, will mean little or nothing unless there is a strengthening of the administrative arm of the judicial system.

It should be apparent that we think that the Executive Secretary should lead the way for the state-wide staff of the judicial system. The administrators in the various courts will follow this lead and the result will be a more coordinated effort than has been seen in the past. Provincialism in the judicial system of the Commonwealth is no longer acceptable; but lest we be misunderstood, we think there must always be an opportunity for input by the various local constituencies of the judicial system.

4. Judicial Manpower

It is conceded by the Select Committee in its Report at page 14 that: Court unification does not wipe out delay or backlogs. It is designed to provide a framework within which judges can attack those problems without the impediments imposed by such fragmentation as presently characterizes the Massachusetts courts.

The extent of the "fragmentation" now existing is a matter of some controversy. The proposal for unification with specialized divisions of the court does not necessarily eliminate "fragmentation". The concept of fragmentation as treated in the Report of the Select Committee, can be said to mean the diversity of the workload, of the various judges and

courts. Unification does not mean that problems can be solved by some sort of judicial musical chairs. The real promise of unification, given adequate financing, is better overall administration of the judicial system.

The Number of Judges

The number of authorized judgeships as of February 9, 1976 is as follows:

Superior Court	46
Land Court	3
Housing Court	3
Probate Court	27
District Court	165
Boston Municipal Court	9
Juvenile Court	<u>5</u>
	258

The Superior Court Judges (67 in 1976)

Although there are 46 Superior Court judges listed, Chapter 303 of the Acts of 1976 permits the assignment of up to twenty-five (25) District Court judges to sit in the Superior Court and act with the full power of a judge of the Superior Court. Under this authority about twenty-one District Court judges did temporarily join the Superior Court making the strength of the Superior Court 66 or 67 in 1976 and 1977. If fully utilized, the Superior Court would expand to 71 (46 regular and 25 district) under this emergency legislation.

While it is too soon to have statistics which relate the effect of this additional number of judges on the work of the Superior Court, it is quite obvious that more cases are moving through the pipeline *in the Superior Court*. There has, however, been an adverse effect on the District Courts from which these judges came and they should return to their District Court duties as soon as possible. The vacated positions on the Superior Court bench should be filled by permanent judges and the full complement of Superior Court judges should be increased to 76.

This is our recommendation.

The District Court Judges

1976 saw the beginning of the end of part-time judge-part-time lawyer, the special justice of the District Court. Everyone interested in the Massachusetts judicial system must keep in mind that within three

or four years, we may very well see the time when the number of District Court judges drop from the present 165 to 125. Some special justices will resign and practice law. Other justices will retire, resign or die during this period. By section 11 of Chapter 862 of the Acts of 1975, no vacancy in the office of special justice of a District Court occurring after February 1, 1976 can be filled by the Governor.

We cannot at this time determine how many judges will be serving in the District Courts by July 1, 1979 by which date all special justices must finally decide whether or not to remain on the bench. We do know that the experimental transfer of justices from the District Court to the Superior Court must come to an end as soon as possible; and we also know that, even with a consolidated DISTRICT COURT OF MASSACHUSETTS which we have recommended, there is a limit below which the number of judges must not be allowed to drop.

If the consolidated District Court truly enables fewer judges¹ to handle the business of the court system, and we hope this is the result, the need for additional judges will still remain in the Superior Court. Since there is little real difference in the salary of the judges of the two courts, it would be foolhardy to rest any decision about increased judicial manpower on the savings differential between the salary of a District Court judge and a Superior Court judge.

D. UNIFICATION OF THE TRIAL COURT

1. Philosophy of Unification

The theory underlying the recent recommendations for "Unification" of Massachusetts courts is that such "Unification" will:

- avoid the expense of wasted time in debating jurisdictional questions,
- provide far more flexibility and efficiency in the use of resources such as judges, courtrooms, clerks, and support personnel, and
- provide trained management that is constantly responsible for the smooth and effective flow of cases.²

¹The Special Committee of the District Courts which studied the trial de novo situation and made a comprehensive report on Dec. 31, 1976 indicates in the section on "Judicial Manpower" that the number of judges necessary in that system to handle de novo appeals before a jury of six is 166. For present business the number is estimated at 145.

²From an interview with Archibald Cox conducted by Charles E. Porter, Jr. of the *Advocate*, Suffolk University Law School Journal Vol. 7, No. 2, at 13.

Jurisdictional Questions

It is the opinion of the Judicial Council that a single trial court of the Commonwealth cannot appropriately handle all the business of the judicial system. There are now three jurisdictional divisions of the judicial business in Massachusetts:

- I. The immense volume of civil and criminal business which does not involve complicated questions of fact or law, and in which the criminal offense is of a less serious nature, and the civil case is one in which the claim, measured in money, is not truly large.
- II. The civil and criminal cases, including appeals for trials de novo in which complicated questions of fact or law are involved, in which Equity principles are involved, and in which criminal offenses are of a serious nature, and the civil case is one where the claim, measured in money, is significant.
- III. The cases which require a specialized tribunal as exemplified by the Probate Courts, the Housing Courts, and the Land Court.

We recognize that it is not always possible to shepherd each individual case to its proper jurisdiction. The constitutional right of every citizen to a jury trial (one which we would not jeopardize) and the observable behavior patterns of litigants and lawyers do not always make judicial administration a bed of roses. We do not intend to destroy a workable system in favor of one which promises nothing better simply because there are occasional difficulties in the present system. We believe that the present system does not work because there are insufficient shepherds to control the large flock.

In a business, when the orders start to exceed the capacity of the factory, you merely stop taking orders until the capacity to fill them returns. The alternative is to enlarge the factory or to hire more people to handle the increased work.

Unfortunately, in a judicial system, we cannot turn down the "orders". The consumers of justice are often unwilling participants, who have no incentive to see the system work, or who wish to see the system work but only to their particular benefit. Few participants are really objective.

Conflicts over jurisdiction are rare and might be handled without the proposed unification plan.

Flexibility and Efficiency

The Judicial Council presented the pros and cons of the "flexibility and efficiency" feature of unification to the General Court more than forty years ago.

As was the case with the Select Committee in 1976, the claim was made earlier that "a uniform court is more flexible; that a case could be at once sent to the division best adapted to handle it, and that judges can be moved to meet the changing load of business." These words constitute the first principal recommendation of the Select Committee.

We said in our Report that there was no reason why there could not be a wide extension of the right to transfer cases from one court to another, nor was there any reason why the transfer of judges could not be made from one court to another. We said further in 1935:

Increased jurisdiction in certain courts and the power in some administrative head to transfer judges would effect all that is claimed for a unified court. But neither a unified court nor the power to transfer cases and judges under our present system will amount to much unless there is lodged somewhere a central administrative control.

As we have stated previously, "at least one of our courts is and must remain a specialized court and will not fit into any scheme of unification." This court is the Land Court. A large part of the work of the Land Court is registration of titles; this is a proceeding in rem. The determination of controversies between parties is purely collateral. The Land Court can (and does) sit anywhere from one end of the state to the other. It has a separate mission from our other courts.

We urged a plan which has now had its successful culmination in the appointment of a Chief Justice and administrative staff for the District Courts and another for the Probate Courts. As we then indicated, this plan called for the creation of a board of managers (Chief Justices) who would represent all of the courts of the Commonwealth and who would be responsible for the effective executive management of the judicial system. We suggested that:

the Supreme Judicial Court would then be in a position to establish conferences with the responsible heads of the other courts and bring about the centralized control *which is the real objective of the unified court idea.*

It is tempting to pursue the bright butterfly of unification particularly when there is also a promise of "flexibility and efficiency" in the use of the resources of the judicial system, and an enhancement of the "effective flow of cases."

How Much Justice Can We Afford?

One of the attractions of "unification" is that it is said that it will stretch the taxpayer's dollar. Since the members of the Judicial Council

are interested in the burden imposed on the taxpayers, this possibility is one which we did not overlook.

In 1921, a period of no great prosperity, the Judicature Commission said:

The Commission believes that there are various ways in which the substantial part of the existing judicial structure can be gradually adjusted without very radical changes to the growing demands of the work required of it.

With the increasing number of problems to be dealt with, the economy in the sense of expense which is possible to-day is, of course, relative. The total expense of the judicial system is apt to increase naturally and unavoidably as the community grows, and the main inquiry in this respect must be as to the best arrangement by which the State and public can get the maximum service and results from the inevitable expense.

In 1977 there is even more reason to prospect for the best arrangement by which "the public can get maximum service and results". This is particularly significant where the expense of the judicial system between 1965 and 1975 has risen 268%, from 27 million dollars to 99 million dollars per year.

Why Does Justice Cost So Much?

In our 49th Report in 1973, we noted that important social legislation has been enacted by the General Court in the last decade which when coupled with decisions from federal and state appellate courts along with increasing public participation in government, has cast a great additional case load on the judicial system of Massachusetts. This has also been the case in every jurisdiction where similar social legislation is in effect. National magazines and other media are now beginning to ask "Is There Too Much Justice"?

What are some of the examples of recent reforms which affect the courts and their flexibility and efficiency?

1. The so-called criminal law explosion:

Not only has our nation become involved in the violent way of life, but the accused is entitled to legal protection which was unknown a few short years ago. We do not criticize this reform, but merely note that it slows the disposition of cases and requires the Commonwealth to pay the enormous cost that such reforms engender. In the year ending June 30, 1975, the Massachusetts Defenders Committee represented 22,503 defendants in the District Courts and 5,427 defendants in the Superior Court, all at the expense of the taxpayer to the tune of \$3,101,931, most of which came from local property taxes.

2. The consumer law explosion:

At every level of government there have been measures adopted for the protection of the consumer. Such measures are ultimately enforceable in judicial proceedings in the District and Superior Courts. In a large number of instances these proceedings involve the time of a judge. They include hearings before a real estate or trustee attachment or wage attachment can be made; a hearing before repossession of motor vehicles or consumer goods; a court hearing before any tenant can be evicted; a court trial if the landlord fails to supply agreed services; and hearings when shoddy merchandise is sold or where services were paid for but proved inadequate, or misrepresented. In this area also are all sorts of malpractice claims and cases of a like nature.

3. New Remedies for Old Wrongs:

The General Court and the Congress have enacted remedial legislation for the amelioration of public and private injustices where no such remedies existed before. Included under this heading are judicial proceedings to protect the right of privacy, the civil rights of the individual, the rights of organized labor in the public sector, the right to information, and a host of other hard won reform measures. All of these rights are useless unless there is a judge who can make the decision that they be enforced. Such judicial activity requires much time and expense to the taxpayer.

4. Environmental Concern and Citizen Participation:

The General Court has wisely decided that a citizen has the right, in fact a constitutional right, to protect the environment by joining with others at the administrative and judicial level for a direct attack on those who allegedly were causing damage to the environment.

Coupled with this specific environmental legislation is a growing inclination on the part of private citizens to bring actions against administrative officers and agencies. Granted that these reforms are excellent, the result is an increasing demand on judicial time and resources. Class actions fall into this group.

5. General Considerations:

We hesitate to issue a catalogue of instances where the desirable reforms of the General Court, many of which were the result of massive citizen participation in government, have affected the cost and the speed of justice. It is a simple fact that if a District Court judge is now required to conduct protracted probable cause hearings; hearings relative to children in need of services; hearings in relation to commitments to mental institutions; bail hearings; and juvenile cases, such judicial business tends to slow down the disposition or hearing of general civil and criminal business.

We cannot permit this occasion to pass without bringing to public attention the fact that Massachusetts cannot have these desirable reform measures enforced without, in the last instance, a judicial proceeding.

As is the case in the noble efforts to provide special education for those children who need it, we are finding that the demand for the new protections, reforms, and services is outstripping the ability of the Commonwealth to pay.

None of the proposals of the Select Committee deals with this economic factor. Not only must this be faced head on, it must be one of the cornerstones of any program for the judicial department. The public cannot and will not have these services "promptly and without delay" unless the finances are provided by the General Court.

Unification Of The English Courts

As we pointed out in our 50th Report in 1974, court unification, as was proposed to the General Court in 1973, and more recently in the Report of the Select Committee, has been advocated at least since the English Judicature Commission of 1869.

Since much of our judicial system has its roots in England, it is appropriate to see if "unification" has provided a solution there. Between 1966 and 1969, the Beeching Commission (Royal Commission on Assizes and Quarter Sessions) examined the criminal courts of Great Britain and effected several changes in that court system.

A single Crown Court was established to take over criminal business. Civil business was diverted to the High Court. Each of these courts was authorized by the Courts Act of 1971 to sit at such places as the Lord Chancellor may determine.

The new structure of English justice includes:

MAGISTRATES COURTS: These have jurisdiction of 98% of all criminal proceedings and some petty civil, matrimonial and administrative matters.

COUNTY COURTS: These hear 90% of all civil proceedings including uncontested divorce cases.

These two courts have the jurisdiction of the present and proposed District Court of Massachusetts, except for divorce cases.

THE CROWN COURT, created in 1971, has unlimited criminal jurisdiction, and hears criminal appeals from the Magistrates Courts.

THE HIGH COURT OF JUSTICE consists of the Queen's Bench Division (Civil Jurisdiction) the Chancery Division (Equity and some Probate) and the Family Division (Probate jurisdiction such as that of the Massachusetts Probate Courts, other than uncontested divorce).

These two courts have the jurisdiction of the present Massachusetts Superior Court and the Massachusetts Probate Courts. It is of special notice that in Great Britain, the single HIGH COURT OF JUSTICE is divided into three specialized divisions.

Of great interest to us in Massachusetts is the fact that in Great Britain the first tier of judges sitting in the HIGH COURT, along with other chief justices, hold their office during good behavior while the judges of the second tier, including all those below, can be removed by the Lord Chancellor for inability (incapacity) or misbehavior.

We cite the English system here merely to demonstrate that total "unification" is certainly not the solution at the fountainhead of the Massachusetts judicial system. More significantly, it indicates that a division of labor in the judicial system is an appropriate avenue of court reform and the one chosen for reform of a judicial system far more ancient than our own.

It is now important to discuss the mission of the courts of Massachusetts whose histories date back to before the Revolution.

2. The Probate Court and Its Mission

The Report of the Select Committee as to the unification of the Probate Courts and the Superior Court does not adequately tell the story of the work of the Probate Courts.

As the Select Committee Report is based on inadequate data, it reaches the wrong conclusion on the performance of the Probate Courts and on the necessity of their continuing role as specialized courts. The initial premise of the Select Committee is that Probate Court Judges have an excess of judicial time on their hands. This is simply not true. The statistical data which follow on pages 28 to 31 tell a more complete story. The statistics for the Probate Courts for fiscal year 1976 show over 20,750 divorce judgments; over 1,900 separate support judgments; over 2,200 divorce modifications; over 10,000 contested motions and hundreds of miscellaneous probate matters. While not all of the above cases were contested, there are hundreds of cases which took hours, days and weeks to try before a judge sitting without a jury. These are facts which are not reflected in statistics.

The figures set out on page 41 of the Select Committee Report are not particularly relevant to *cases* handled by the Courts; and are not sufficiently indicative of the caseload of the Probate Courts, even in 1973. More recent figures (table 2) give a much clearer picture of the judicial work being performed in the Probate Courts. These figures demonstrate that the Probate Courts are busy and productive; and that there is not the reservoir of time available in the Probate Courts that the Select Committee Report assumes. The continuity of local community relationships is very important in serving the specific needs of our communities by the Probate Courts. This is especially true of the one-

judge Probate Courts of Barnstable, Hampshire, Franklin and Berkshire counties.

The Select Committee Report proposes unifying the Probate and other specialized courts into the Superior Court and states that there should be an option to create or abolish specialized divisions. This is merely a cosmetic change. If we fail to recognize specialized areas of the law, the Massachusetts public will suffer because this may result in judges having a lesser degree of expertise in these specialized areas than the lawyers who practice before them. If we do recognize these specialized areas of law, why not retain the specialized courts that have served the public of Massachusetts so well in the past?

TABLE 2**THE BUSINESS OF THE PROBATE COURTS**

The following table represents the total number of contested and uncontested matters, as well as the percentages of each, heard in each county Probate Court during fiscal year 1976 (July 1, 1975 to June 30, 1976).

<u>County</u>	<u>Total # of Contested Matters</u>	<u>Total # of Uncontested Matters</u>	<u>Percent of Contested Matters</u>	<u>Percent of Uncontested Matters</u>
Barnstable	813	2,573	24%	76%
Berkshire	803	2,170	27%	73%
Bristol	2,402	6,339	27%	73%
Dukes	86	312	22%	78%
Essex	4,473	6,616	40%	60%
Franklin	421	1,157	27%	73%
Hampden	3,360	4,985	40%	60%
Hampshire	263	1,260	17%	83%
Middlesex	6,988	20,252	26%	74%
Nantucket	41	181	18%	82%
Norfolk	2,441	6,301	28%	72%
Plymouth	2,653	4,759	36%	64%
Suffolk	3,043	13,285	19%	81%
Worcester	2,280	7,248	24%	76%
Total	30,067	77,438	27% average	73% average

Business of the Probate Courts by Counties.

TABLE 3
PROBATE DECREES
AND ORDERS
FISCAL 1976

	BARNSTABLE	BERKSHIRE	BRISTOL	DUKES	ESSEX	FRANKLIN	HAMPDEN	HAMPSHIRE	MIDDLESEX	NANTUCKET	NORFOLK	PLYMOUTH	SUFFOLK	WORCESTER	TOTALS
Divorces, contested Percentage (%)	241 (29%)	373 (59%)	942 (57%)	13 (25%)	910 (39%)	171 (54%)	1,091 (56%)	209 (51%)	963 (18%)	6 (17%)	351 (21%)	649 (48%)	684 (35%)	1,069 (44%)	7,672 (37%)
Divorces, uncontested Percentage (%)	581 (71%)	262 (41%)	704 (43%)	39 (75%)	1,430 (61%)	145 (46%)	841 (44%)	204 (49%)	4,269 (82%)	30 (83%)	1,286 (79%)	702 (52%)	1,245 (65%)	1,347 (56%)	13,085 (63%)
Separate Support, contested Percentage (%)	23 (50%)	22 (63%)	4 (1%)	0	65 (63%)	3	25 (61%)	4 (44%)	38 (16%)	0	63 (41%)	88 (77%)	251 (35%)	36 (47%)	622 (32%)
Separate Support, uncontested Percentage (%)	23 (50%)	13 (37%)	375 (99%)	0	39 (37%)	0	16 (39%)	5 (56%)	197 (84%)	0	92 (59%)	27 (23%)	474 (65%)	40 (53%)	1,301 (68%)
Contempts, contested Percentage (%)	162 (43%)	49 (74%)	172 (67%)	8 (67%)	803 (99%)	57 (92%)	613 (94%)	16 (59%)	1,121 (70%)	7 (39%)	574 (91%)	195 (74%)	246 (44%)	209 (76%)	4,232 (75%)
Contempts, uncontested Percentage (%)	219 (57%)	17 (26%)	85 (33%)	4 (33%)	5 (1%)	5 (8%)	39 (6%)	11 (41%)	491 (30%)	11 (61%)	59 (9%)	70 (26%)	317 (56%)	65 (24%)	1,398 (25%)
Modifications, contested Percentage (%)	57 (75%)	106 (66%)	195 (68%)	5 (71%)	118 (77%)	41 (98%)	404 (80%)	20 (47%)	150 (57%)	3 (75%)	144 (88%)	61 (64%)	82 (62%)	258 (70%)	1,644 (72%)
Modifications, uncontested Percentage (%)	19 (25%)	55 (34%)	91 (32%)	2 (29%)	35 (23%)	1 (2%)	100 (20%)	23 (53%)	111 (43%)	1 (25%)	20 (12%)	34 (36%)	50 (38%)	109 (30%)	651 (28%)
Equity, contested* Percentage (%)	45 (71%)	125 (38%)	2 (0%)	4 (7%)	121 (91%)	60 (83%)	67 (23%)	7 (7%)	210 (22%)	3 (7%)	70 (84%)	66 (81%)	105 (18%)	86 (7%)	971 (20%)
Equity, uncontested Percentage (%)	18 (29%)	208 (62%)	985 (100%)	57 (93%)	12 (9%)	12 (17%)	221 (77%)	90 (93%)	731 (78%)	42 (93%)	13 (16%)	15 (19%)	471 (82%)	1,116 (93%)	3,991 (80%)

*For the four-month period of July to October 1975 wills were also a part of this category. In November of 1975 the category was modified to reflect only the number of equity matters. The figures which appear above, therefore, do not only include "equity" but include "wills," as well.

TABLE 3 (cont.)
PROBATE DECREES
AND ORDERS
FISCAL 1976
 (page 2)

	BARNSTABLE	BERKSHIRE	BRISTOL	DUKES	ESSEX	FRANKLIN	HAMPDEN	HAMPSHIRE	MIDDLESEX	NANTUCKET	NORFOLK	PLYMOUTH	SUFFOLK	WORCESTER	TOTALS
Ex Parte, contested* Percentage (%)	83 (26%)	31 (37%)	217 (26%)	42 (62%)	804 (43%)	30 (56%)	272 (23%)	0	1,906 (38%)	0	168 (31%)	926 (64%)	701 (13%)	283 (30%)	5,463 (30%)
Ex Parte, uncontested Percentage (%)	236 (74%)	53 (63%)	605 (74%)	26 (38%)	1,081 (57%)	24 (44%)	908 (77%)	128	3,157 (62%)	5	379 (69%)	532 (36%)	4,822 (87%)	673 (70%)	12,629 (70%)
Motions, contested** Percentage (%)	173 (41%)	79 (60%)	866 (47%)	14 (25%)	1,516 (39%)	50 (20%)	476 (50%)	0	1,756 (45%)	18 (50%)	985 (45%)	603 (36%)	872 (39%)	334 (68%)	7,742 (42%)
Motions, uncontested Percentage (%)	245 (59%)	52 (40%)	980 (53%)	43 (75%)	2,373 (61%)	204 (80%)	483 (50%)	125	2,145 (55%)	18 (50%)	1,184 (55%)	1,085 (64%)	1,391 (61%)	156 (32%)	10,484 (58%)
Adoptions, contested** Percentage (%)	4 (7%)	7 (18%)	0	0	4 (2%)	7 (27%)	6 (4%)	0	2	0	7 (5%)	18 (9%)	2 (2%)	5 (2%)	62 (3%)
Adoptions, uncontested Percentage (%)	51 (93%)	31 (82%)	86	8	231 (98%)	19 (73%)	154 - (96%)	11	472	10	138 (95%)	178 (91%)	127 (98%)	233 (98%)	1,749 (97%)
Contested Probate** Percentage (%)	25 (2%)	11 (1%)	4 (0%)	0	132 (9%)	2 (0%)	406 (15%)	7 (1%)	842 (9%)	4 (6%)	79 (2%)	47 (2%)	100 (2%)	0	1,659 (5%)
Uncontested Probate Percentage (%)	1,181 (98%)	1,479 (99%)	2,428 (100%)	133	1,410 (91%)	747 (100%)	2,223 (85%)	663 (99%)	8,679 (91%)	64 (94%)	3,130 (98%)	2,116 (98%)	4,388 (98%)	3,509	32,150 (95%)
Appointment of Masters**	2	1	3	4	9	0	0	0	101	0	54	9	6	3	192
Masters' Reports Filed	0	0	3	0	3	0	0	0	67	0	18	7	1	1	100

* Category discontinued 10/75

**Category added 11/75

Total Contested Matters
Percentage (%)

Total Uncontested Matters
Percentage (%)

30,067
(28%)

77,438
(72%)

TABLE 4

**MASSACHUSETTS PROBATE COURTS
TOTAL NUMBER OF CASES AWAITING TRIAL AFTER REQUEST
(OCTOBER, 1976)**

Barnstable	15
Berkshire	14
Bristol	440
Dukes	0
Essex	723
Franklin	300
Hampden	803
Hampshire	42
Middlesex	1,602
Nantucket	0
Norfolk	378
Plymouth	641
Suffolk	1,050
Worcester	317
Awaiting Trial	Total 6,325

TABLE 5

**TRIAL DELAY AFTER REQUEST
(OCTOBER, 1976)**

County	Contested Matters	Uncontested Matters
Barnstable	2 months	1½ months
Berkshire	1 month	0
Bristol	4 months	1 month
Dukes	0	0
Essex	3 months	2 months
Franklin	1½ months	1½ months
Hampden	2½ months	2 months
Hampshire	1 month	1 month
Middlesex	5 months	3 months
Nantucket	0	0
Norfolk	7 months	1 month
Plymouth	2 months	4 months
Suffolk	2½ months	1½ months
Worcester	<u>5 months</u>	<u>1 month</u>
	(2.6 months average)	(1.4 months average)

General Probate Jurisdiction

In addition to the family law work which is accomplished by our Probate Courts we should not fail to mention the many probate matters which require the daily attention of the Probate Judges, Registers, Assistant Registers and clerical employees of the Registry.

Probate Courts are courts of record, see G. L. ch. 215, §1. Under §2 of said ch. 215 they are courts of superior and general jurisdiction, and under §3 of said chapter, the Probate Courts have jurisdiction of the probate of wills, administration, guardians, conservators, adoptions, changes of names as well as domestic relations matters. Under said ch. 215, §6, the Probate Courts have original and concurrent equity jurisdiction with the Supreme Judicial and Superior Courts of all cases and matters cognizable under the general principle of equity jurisprudence except labor disputes. Under said ch. 215, §6, the Probate Courts also have concurrent jurisdiction with the same courts, mentioned above, in all cases in which equitable relief is sought relative to administrations, wills, testamentary or inter vivos trusts, receiverships of the estates of deceased persons, parol, resulting or constructive trusts, guardians and conservators, etc.

These probate and equity matters require close and constant supervision by the judges and supporting personnel of the Probate Courts. In fiscal 1976 there were 26,590 accounts filed in our Probate Courts and 21,314 accounts allowed. These accounts require the constant supervision and eventual signature (or allowance) of a Judge of Probate. Where an objection is entered against an account, which occurs frequently, a trial results. These trials may take hours, days or weeks for a judge to hear. To demonstrate the importance of the matter of probate accounts, the Standing Advisory Committee to the Supreme Judicial Court has recently completed drafting a proposed Rule 72 for the Massachusetts Rules of Civil Procedure which would bring probate accounts, which proceedings are thought to be equitable in nature, see G. L. ch. 206, under the general rules rather than leaving them under the probate rules. The drafting of proposed Rule 72 has dominated the meetings of the Standing Advisory Committee for over a year and even now there is no unanimous opinion about the proposed rule, so many and varied are the ramifications of this change in procedure.

Problems concerning conservators and guardians arise daily. For the single Judge of Probate or the Probate Judge in a multi-judge court, who sits in the first, or motion, session one of the frequent vexing problems is the request for appointment of a guardian or conservator.

A judge must have his wits about him when he is asked to make such an appointment. The judge must ask himself whether the ward is really physically or mentally ill or disabled or whether this is just an attempt to gain control of the ward's assets by a scheming relative or friend. The judge in these cases must be able to ask many penetrating questions of the lawyers and the proposed fiduciary. The experience to ask the right questions is acquired slowly and requires sympathetic, constant attention by the judges.

Consider the various human problems involved in adoptions. The judge must exercise the utmost care when reading reports to assure himself that the adoptee, and his natural and adoptive parents have been accorded due process of law so that their interests and the interests of society have been protected.

The expertise for these strictly probate matters have been patiently acquired by Probate Judges over the years of their judicial tenure and, in most cases, as lawyers before their judicial appointments.

To emphasize this aspect of a Probate Judge's life, please see fiscal year 1976 statistics (Table 6) which have a bearing on these items.

3. The Land Court and its Mission

In 1898 the General Court enacted for the Commonwealth a voluntary system of land registration (the Torrens system) and established the Land Court as a state wide court of record to administer it. The purpose of the Land Registration Act, now General Laws, Chapter 185, was to provide a means by which title to land could be made certain and indefeasible, to limit rights in land to registered rights, and to bind the land and quiet title to it so that persons owning and dealing with it could safely rely on the files of the land registry. The Land Court's judicial complement has one Judge who also has statutory administrative powers and two associate judges. In addition, the Court has sixty-three support personnel ranging from the recorder (who is comparable to the clerk in other courts) to and including its very important engineering staff.

The Massachusetts land registration system is probably the most advanced in the country, perhaps in the world. Since, unlike in most other registration systems, boundaries are guaranteed, the engineering department has established procedures which are the envy of courts and registries of deeds of every other jurisdiction. To enable the registration system to work properly an administrative procedure, which is closely monitored and directed by a judge, is required. In this procedure a Land Court examiner, appointed by the Court, usually on the

TABLE 6

**PROBATE BUSINESS
ANNUAL STATISTICS
JULY 1, 1975 - JUNE 30, 1976**

	BARNSTABLE	BERKSHIRE	BRISTOL	DUKES	ESSEX	FRANKLIN	HAMPDEN	HAMPSHIRE	MIDDLESEX	NANTUCKET	NORFOLK	PLYMOUTH	SUFFOLK	WORCESTER	TOTALS
Original Entries															
All petitions, libels, acc ts & complaints (f)*	3,439	6,314	7,586	379	12,694	1,645	7,034	2,522	21,347	208	12,868	6,520	14,379	10,918	107,853
Probate Decrees															
Administrations (f)*	163	446	539	32	1,335	190	1,213	149	1,591	30	1,645	885	1,949	1,712	11,879
Administrations (a)**	149	194	1,122	22	828	101	1,138	117	1,695	7	851	874	1,530	891	9,519
Wills (f)	662	503	1,151	78	1,828	65	1,029	278	2,892	39	1,784	879	1,529	1,441	14,158
Wills (a)	612	391	876	66	1,452	185	741	216	2,975	38	1,598	736	1,271	1,385	12,542
Trusteeships (f)	46	40	57	3	146	8	53	13	289	3	180	39	115	86	1,078
Trusteeships (a)	36	35	81	2	149	10	53	14	305	3	172	37	101	94	1,092
Guardianships (minor) (f)	36	41	102	3	135	20	215	44	174	1	153	95	254	144	1,417
Guardianships (minor) (a)	50	38	111	4	119	19	152	24	219	6	155	99	243	142	1,381
Guardianships (men, ill) (f)	30	14	70	1	142	8	67	41	210	1	145	74	136	79	1,018
Guardianships (men, ill) (a)	14	9	55	2	37	8	34	10	195	0	85	61	117	72	699
Accounts & Distributions (f)	888	976	1,120	93	2,951	500	2,223	566	5,781	45	3,574	1,068	4,487	2,315	26,590
Accounts & Distributions (a)	596	1,221	997	57	2,674	474	1,850	486	2,841	40	3,577	1,064	3,701	1,736	21,314
Partitions (f)	14	9	42	7	51	3	12	9	37	1	27	38	22	38	310
Partitions (a)	6	2	35	5	8	2	15	4	22	0	23	15	15	3	155
Real estate sales (f)	170	131	319	17	514	65	279	114	911	12	429	259	302	416	3,938
Real estate sales (a)	158	121	364	12	477	64	260	69	875	11	405	307	360	415	3,898
Equitable Relief															
Complaints (f)	58	47	96	8	201	23	87	43	338	9	189	147	143	70	1,459
Preliminary Injunctions (i)***	1	8	17	1	32	15	10	5	111	4	68	48	0	8	328
Temp. Restraining Orders (i)	9	18	26	0	77	60	22	11	127	4	66	36	0	22	478
Default Judgments	0	10	10	0	5	0	3	0	52	0	5	5	0	3	93
Final Judgments after hearing	5	16	36	1	71	7	58	17	53	5	273	39	94	13	698

(f)* filed

(a)** allowed

(i)*** issued

recommendation of the petitioner, first examines the title. The abstract of title is then read and reviewed by the Court's own title examiner under the direct supervision of a judge of the Court. Efforts in uncontested cases are then made to perfect the title by requiring other or further proof. The plan and the engineering work are checked by the engineering department at the Court before a decree issues. Each step in the process requires the close and constant supervision and involvement of the judge to whom the case is assigned.

If the registration petition is contested, a trial is held and a detailed decision of fact and law is written by the trial judge. The immediate availability of any of the three judges for conference with counsel frequently results in the satisfactory resolution of issues without trial. It is apparent that the judges of the Land Court are kept very busy, apart from the trial of contested cases. How this type of jurisdiction and the expertise of those who administer it can be merged with that of another court, without impairing or destroying the land registration system itself, is difficult to understand.

The Land Court is an indispensable component of the Land registration system. To eliminate its strong public independent identity by merger with the Superior Court or to dilute its exclusive jurisdiction would have a catastrophic and destructive effect on the land registration system which the Commonwealth has insured with public funds. It would also be a distinct disservice to the public and the bar who have had confidence in and relied upon it for 79 years.

The highly technical and specialized work of the Land Court does not usually bring within its jurisdiction the type of controversy which attracts widespread media or public interest. Nevertheless, the work of the Land Court is very specialized, often tedious and difficult judicial work which is frequently more far reaching in its lasting consequences, both public and private, than much of the work of other court units. The work of the Land Court has become even more complex in recent years as new forms of land ownership, such as the condominium concept, have evolved. The trial of contested cases in the court often takes days or weeks to hear and frequently involves multiple parties. One case currently before the Court involves more than 40 counsel representing various parties.

Each registry of deeds in the Commonwealth has a registry district of the Land Court, and in the performance of his duties under Chapter 185 each register of deeds is an assistant recorder of the Land Court for the respective registry districts. This statutory obligation requires con-

stant liaison with the judges of the Land Court and its supporting technical staff to insure that the registration system operates efficiently and effectively. The various registries are visited periodically by one or more of the judges to discuss problem cases, and the Land Court schedules periodic educational conferences to which registry personnel are invited. The Land Court, therefore, must and does devote time and energy to administering the Torrens system. This requires specialist judges and specialist support personnel.

The Report of the Select Committee on Judicial Needs does not readily manifest any comprehensive understanding of the true measure of the work of the Land Court. At page 3 of the Report, where there are listed all of the other trial courts in the Commonwealth, the Land Court is conspicuously omitted. The Report, on page 9, devotes three brief paragraphs to the Land Court. It mentions in passing that the Land Court's jurisdiction is "exclusive in part," but totally fails to recognize the Land Court's integral and important function of administering the Land Registration Act. On page 16, the Report acknowledges that the Land Court "is current in its docket" and is "working at capacity" and that its judges "should not be drawn away to handle the general trial caseload" of the Superior Court. It is pertinent to observe that no member of the Select Committee prior to the issuance of its report, to the knowledge of the Land Court personnel, ever visited the Court to talk with any judges of the Court or any of the Court's staff, despite an express invitation to do so. Nor was the Judge of the Land Court invited to appear before the Select Committee, although the judges of the Land Court did offer their views to the Select Committee in writing.

The Land Court also exercises original exclusive jurisdiction in many other areas, notably proceedings for foreclosure of and redemption from tax titles under Chapter 60 of the General Laws, proceedings in the nature of writs of entry and certain petitions to determine the validity and extent of municipal zoning ordinances, by-laws and regulations.

Through the years the Land Court has been given original concurrent equity jurisdiction with the Superior Court over all matters involving any interest in land except suits in equity for specific performance of contracts. In fact, much of the work involving real estate previously done by the Superior Court is now performed by the Land Court. Thousands of petitions for permission to foreclose mortgages are brought each year in the Land Court thus reducing the pressure on the Superior Court. Its jurisdiction has recently been enlarged by

ter 808 of the Acts of 1975 under which zoning appeals may be made to the Land Court.

The Land Court is not a jury court, but on petition of any party jury issues are framed for trial in the Superior Court. This procedure is seldom utilized, but its availability preserves the right to trial by jury.

The most fundamental objective of the Report of the Select Committee is to strengthen and improve the administration of justice in the Commonwealth and to make the legal system more readily accessible to those who need it. This objective is, of course, enthusiastically endorsed. However, the case for merger of the Land Court into the Superior Court is predicated in substantial part as a measure which would help to relieve the present serious case congestion in the Superior Court by making available the present three Land Court judges to assist in the general civil and criminal caseload of the Superior Court. Yet the Report on page 41 asserts that the judges of the Land and Housing Courts are "extremely busy", they "handle their business with dispatch" and that "nothing should be done to draw judges away from them or otherwise lessen their effectiveness." On one hand the option to have three more judges available for general Superior Court work is sought, and on the other hand the Report implicitly admits that to do such would undoubtedly reduce the effectiveness of the Land Court.

The elimination of the Land Court as an independent, separate component of our judicial system will not in any appreciable way help to reduce the present congestion in the Superior Court. It will merely transfer the existing caseload of the Land Court to the Superior Court and, thus, further encumber the Superior Court with additional entries. However, the proposed merger will have a devastating effect on the continuation of the land registration system which has served the public so well for so long. It is the height of imprudence and folly to propose such a drastic change of a public institution when there is no demonstrated beneficial result achievable.

The court congestion in the Superior Court will only be solved by the appointment of an additional number of Superior Court judges sufficient to manage the existing and projected caseload. It will never be adequately solved by simply transferring in toto judges with a particular expertise in one highly specialized area of the law into an unfamiliar judicial bailiwick.

A more practical and modest approach short of total merger would seemingly better accomplish the objectives of the Report. Legislation could authorize the Chief Justice of the Supreme Judicial Court with

the approval of the Judge of the Land Court or the Chief Justice of another existing court unit to assign judges to the Superior Court for specified periods of time to assist in relieving acute congestion in certain counties. The Superior Court could exercise its existing statutory power to transfer more land related cases to the Land Court. The Land Court's jurisdiction could be enlarged by giving it additional legal, as well as equity jurisdiction over land matters and making it clear that the court has jurisdiction to award damages in land related matters.

To add other independent court units and other administrative duties to the Superior Court in an attempt to alleviate its existing overwhelming burdens simply defies reason and common sense.

We should not repeat the costly mistake made in the enactment of comprehensive welfare reform legislation in the 60's. This well intentioned legislation combined good, efficient municipal welfare offices with an inefficient state system. It was designed to provide better and more economical services through the use of better planning and more efficient administration in a manner similar to the present Select Committee proposals for the courts. It behooves us to be cautious of comprehensive changes in any existing system.

The Report of the Select Committee is very emphatic in its recommendations that the state assume the funding for all of the courts. The Land Court wholly agrees with this recommendation.

The Supreme Judicial Court, the Appeals Court and the Land Court are currently the only wholly state-funded courts in the Commonwealth. Except for a small amount incurred for stenographic services, the expenses of the Land Court are entirely funded by the Commonwealth. The great handicap of the Land Court is its occupancy of a courthouse owned by Suffolk County and rented for the Land Court by the Commonwealth. This arrangement does not promote or provide adequate services or facilities.

The Report stresses the undesirability of many separate court budgets that are now filed and proposes that this should be remedied by the state's assumption of all court costs. The Land Court currently submits its budget to the Governor's budget bureau with copies to the Chief Justice of the Supreme Judicial Court and the Executive Secretary. It would be just as easy to submit the budget itself to the Chief Justice of the Supreme Judicial Court to enable him to submit a single budget for all the courts to the Governor and Legislature. Transfer of budgeted funds between courts should be limited, however.

The Land Court believes that the existing court system can be improved immeasurably without the radical legislative changes recommended by the Select Committee. Many changes proposed therein can be made without legislation and should be adopted by the courts themselves. This can be done under the leadership of the Chief Justice of the Supreme Judicial Court working through and with the Executive Secretary and the Chief Justices of the various lower courts.

The Land Court offers the following specific suggestions to strengthen and improve the administration of justice:

1. Enact legislation allowing the Chief Justice of the Supreme Judicial Court to assign judges of the Land Court (and other courts as well) to sit in courts where judicial manpower is needed. This should be done, of course, only after consultation with the Chief Justice of the court from which the judge is to be taken.

2. Enact legislation to transfer some jurisdiction and functions from the Superior Court to other less busy courts and utilize existing legislation to increase the transfer of cases where there now is concurrent jurisdiction, as for example, the transfer of equity cases involving land from the Superior Court to the Land Court.

3. Enact legislation to give the Land Court broader jurisdiction over bills for specific performance of land related contracts and over suits in the environmental field now in the exclusive domain of the Superior Court; make clear the Land Court's broad jurisdiction over zoning appeals and give it power to award damages in land related cases.

4. Enact legislation to confirm that the presently exercised administrative authority of the Judge of the Land Court is, in fact, appropriate.

4. The Housing Court and its Mission

In an opinion on November 15, 1976,² Chief Justice Hennessey of the Supreme Judicial Court defined the mission of the two Housing Courts, one at Boston and the other in Springfield, in substance, as follows:

The Housing Court of the City of Boston was established by statute, G. L. c. 185A, effective January 1, 1972, so as to provide a specialized forum to handle all criminal and civil matters regarding housing that arise in Boston. It is a court of limited jurisdiction, the scope of which is defined in G. L. c. 185, §3. . . .

The defendants argue that the plaintiff has enforced the law in a discriminatory manner and, by failing to maintain order, has

²*Police Comm'r v. Lewis*, _____ Mass. _____, 357 N.E.2d 305, 307-309 (1976).

deprived tenants of their right to safe and secure housing in violation of State and Federal law (see note 3 *supra*), and that these laws are concerned with the health, safety or welfare of tenants. We believe that such a broad interpretation would be contrary to the legislative intent to grant only limited jurisdiction to the Housing Court, for if we were to adopt the defendants' position, the power of that court would extend to every matter affecting the health, safety or welfare of tenants in Boston. In view of our conclusions and reasoning we do not reach the issue whether it has been shown that this case arose under 'any other general or special law, ordinance, rule or regulation.'

An examination of the legislative history of G. L. c. 185A reveals that the General Court did not intend to create a court to handle all problems affecting residents of Boston, but rather its objective was to establish a separate, specialized court with expertise in the area of housing. Under c. 70 of the Resolves of 1966, the Legislature directed that a special commission be formed to investigate "the laws, codes, and regulations governing matters arising out of or connected with the relationship between landlords and tenants in the city of Boston, with a view to perfecting such laws . . . and establishing a court, board or agency . . . to afford, after prompt hearing, immediate relief to landlord or tenant" The special commission, in its report to the Legislature, recommended that a special Housing Court be created to expedite and improve the disposition of housing cases and that the court "have jurisdiction over every facet of landlord-tenant relations dealing with substandard dwellings." 1968 House Doc. No. 4498. The special commission's report, many provisions of which were later adopted into law, leaves the unmistakable impression that the role envisioned for the Housing Court with respect to tenants was one of a vigilant enforcer of the law relating to housing conditions and the physical environment within the immediate vicinity of tenants' homes.

This theme was later incorporated in the two proposed bills that were introduced in 1969-1971 and that were the basis for 1971 House Bill No. 5873, which, with minor modifications, became G. L. c. 185A, inserted by St. 1971, c. 843, §1. Both House Bills, 1971 House Bills Nos. 956 and 4202 (see also 1969 House Bill No. 1160, 1969 Senate Bill No. 621, 1970 House Bill No. 4202, and 1970 Senate Bill Nos. 518, 1579), contained the same preamble, which, although it was subsequently deleted in the final 1971 House Bill No. 5873, elucidates the intent of the sponsors of the legislation which created the Housing Court.

The preamble read: 'The need for adequately maintained residential housing is of grave concern, and the existing means of enforcing minimum standards of fitness for human habitation are unsuited to the volume and nature of the task. . . . A specialized, expert and remedial judicial procedure is urgently needed to stim-

ulate better housing maintenance and better relations between property owners and occupants for the well-being of the public at large." 1971 House Bills Nos. 956, 4202.

General Laws c. 185A, §3, see note 4 *supra*, designates certain statutes and acts as within the jurisdiction of the Housing Court. Although this list cannot be all-inclusive considering the language of §3, it is indicative of the type of actions that the Legislature had in mind when establishing the Housing Court. We observe that the laws specified in §3 deal primarily with landlord-tenant relations (see G. L. c. 218, §§21-25, G. L. c. 186, §§14, 18, and G. L. c. 239), minimum housing standards as defined, by the State Sanitary Code, the State and city building code, and the fire prevention laws (see G. L. c. 143, G. L. c. 148, G. L. c. 111, §§127A-127F, 127H-127L, and St. 1938, c. 479), and zoning regulations (see St. 1956, c. 665). Furthermore, G. L. c. 185A, §16, provides for the appointment of housing specialists to aid the judge in the performance of his duties. The job qualifications for these positions provide further insight into the intended scope of jurisdiction of the Housing Court. Housing specialists are required by §16 to be knowledgeable in the fields of maintenance, repair and rehabilitation of housing and in the area of landlord-tenant problems as they pertain to dwelling units. (Citations omitted.)

5. The Superior Court

The integrity of the Superior Court as the great criminal and civil jury trial court, and as the great court of equity must be preserved. It is argued that the integrity of this institution is endangered by proposals which would dilute the quality of justice which the Superior Court has delivered to the people since its inception.

The Superior Court recognizes the existing expertise of the justices of the courts of specialized jurisdiction: the Probate, Land and Housing Courts. The Superior Court opposes the merger of these courts into the Superior Court. Such a merger would impair the effectiveness of the specialized functions rendered by these courts as well as dilute the effectiveness of the Superior Court.

The Superior Court recognizes the value of the system of the District Courts which serve the immediate, local needs of the people. The work of these courts is about to be increased dramatically and these courts will necessarily demand the return of the District Court judges now serving in the Superior Court. The number of District Court judges now certified to serve in Superior Court indicates plainly that the workload of the Superior Court demands additional judges in order for that court to perform its function effectively.

Patchwork substitution of manpower from other courts is no perma-

ment solution. Ideally the Superior Court should be composed of 120 judges so that there would be one Superior Court judge for each 50,000 people in the Commonwealth. Available statistics establish that there is an immediate need for at least 34 additional Superior Court judges which would result in a total of 80. The certified District Court judges should be allowed to return to their own courts and permanent replacements be made on the Superior Court within two years.

To ease the burden of jury trial cases in the Superior Court, it may be necessary to transfer non-jury cases to other courts for final disposition. The answer to court congestion will not be found in moving judges, but in moving cases. The Superior Court should be authorized to transfer non-jury cases to other courts.

The Superior Court should have its separate budget, but the diversion of funds from one court to another is unacceptable.

The Chief Justice of the Superior Court should be given the power, authority and capability to manage effectively the Superior Court. This includes management and control of supporting personnel: staff, clerks, court officers, reporters and probation personnel; courtroom facilities; and the scheduling of court business and sessions, both civil and criminal.

In the final report of a "Special Committee on Trial De Novo" dated December 31, 1976, the recommendation was made that the criminal trial de novo with the appeal to Superior Court, be totally eliminated. The first option recommended by this committee of which the Honorable Edith W. Fine was Chairwoman, was that any defendant convicted in a District Court would have the right to a de novo retrial only in a District Court before a jury of six. To implement such a plan, if approved by the General Court, it was also the conclusion of this Special Committee that "Superior Court assignments (of District Court judges) will terminate as planned and that legislation will be enacted authorizing the filling of Special Justice positions as they become vacant."

The approximate number of 20 District Court judges who have been serving in the Superior Court should be returned to the District Courts if the assumptions of Judge Fine's committee are accurate and its recommendations are followed.

Additional justices must be added to the Superior Court.

The business of the Superior Court is demonstrated by the accompanying tables. Table 7 indicates the criminal business and Table 8 indicates the civil business for the year ending June 30th, 1976.

6. Recommendations of the Judicial Council on Unification

In our 50th Report for 1974, we said that we did not believe that “an effort for unification should presently be mounted to achieve the goal of ‘unifying’ all the courts.” (p. 48)

In our 51st Report for 1975, we said that:

There is more reason in other jurisdictions to talk about unification than there is in Massachusetts. There is no magic in the unification of the district court, the probate court, the housing court, the land court, and the superior court. Unification is impossible without a new method of financing, and it is not possible without a drastic revision of the concept of county government unless pursuant to proposals such as Senate 629 of 1976 the entire costs of the courts are shifted to the Commonwealth. There does not seem to be tremendous support for such legislation. Traditionally, the district court has been community based and the superior court, although largely state financed, is still a county institution in the eyes of the public.

We also stated that the General Court and the average citizen of the Commonwealth must first become convinced that one single trial court would be more efficient and result in better administration of justice than the several courts we now have.

It still remains to be demonstrated, even after the work of the Select Committee, that a unified Trial Court will result in more efficient and better administration of justice. We are of the opinion that such will not be the case and that while it is now time to unify the seventy-two separate District Courts of the Commonwealth into one DISTRICT COURT OF MASSACHUSETTS, with the several divisions that may be found to serve the people in the most efficient and economical manner, the “unification” plan should, at least for the present, be confined to the District Courts.

We do not recommend the unification of the Superior, Probate, Land and Housing Courts. We do not oppose the unification merely to enshrine historical institutions. If we believed that the unification of these courts would better serve the people of the Commonwealth, we would say so. But such a unification, if it means the abolition of the Probate, Land and Housing Courts, will not serve the people.

We are intrigued by the comment of almost every individual who has devoted time and energy to the concept of unification to the effect that “there will have to be specialized divisions” within the unified court. As an example, in the American Bar Association “*Standards Relating to Court Organization*” (1974) it is said:

Where the court of original proceedings is divided into geographi-

TABLE 7 CRIMINAL BUSINESS July 1, 1975 to June 30, 1976 SUPERIOR COURT CRIMINAL BUSINESS FISCAL YEAR 1976

INDICTMENTS	Banble	Bedline	Bend	Dates	Vanster	Eos	Franklin	Hampton	Hamphire	Madley	Norfolk	Suffolk	Worcester	Plymouth	B76 FT TOTAL	B77 FT TOTAL	Change m B76
A. Criminal Indictments Pending 7/1/75	435	416	1,390	43	21	1,690	70	4,674	661	3,094	1,133	7,061	1,195	1,762	24,037	21,596	+11.3%
B. New Indictments	326	465	1,629	63	8	1,600	112	3,405	305	2,553	1,227	3,340	2,540	1,725	19,016	17,330	+9.7%
C. Total Pending Indictments	761	881	3,018	106	29	2,300	183	8,077	966	5,647	2,360	11,001	3,735	2,487	13,033	38,939	+10.0%
D. DISPOSED OF BY TRIAL	31	27	68	37	0	133	10	225	13	404	84	457	488	56	2,013	2,896	-30.4%
E. DISPOSITIONS NO TRIAL	289	341	1,420	0	27	1,487	44	2,250	319	1,687	1,017	2,840	2,556	997	15,014	16,187	-7.1%
F. TOTAL DISPOSITIONS	320	368	1,488	37	27	1,581	54	2,454	332	2,004	1,101	3,277	3,044	1,053	17,054	19,083	-10.7%
G. Criminal Indictments Pending 6/31/76	464	513	2,130	69	8	1,348	128	5,393	634	3,556	1,259	7,724	741	1,534	26,002	19,833	+31%
H. Number of Defendants Waiting Disposition	117	146	1,262	20	1	69	50	3,173	290	1,636	467	4,439	224	804	13,318	10,330	+29.3%
APPEALS	DISTRICT COURT APPEALS AFTER BENCH TRIAL						(FOR TRIAL DE NOVO)										
I. Appeals From District Court Pending 7/1/75	787	276	1,660	9	5	2,580	98	3,611	438	3,186	1,300	4,672	808	2,035	21,374	15,912	+54.3%
J. New Appeals Filed	687	99	1,604	53	12	2,096	180	1,413	792	2,854	1,368	3,985	2,113	1,498	17,782	17,674	+0.7%
K. Total Appeals In Progress	1,474	375	3,264	62	27	4,686	278	5,024	730	6,040	2,668	8,667	2,924	3,063	40,255	33,586	+19.0%
L. DISPOSED OF BY TRIAL	72	17	26	14	3	38	16	94	29	262	35	313	489	16	1,125	1,521	-6.3%
M. DISPOSITIONS NO TRIAL	661	254	1,167	31	6	2,611	104	800	273	2,069	1,029	2,673	1,884	1,155	14,753	12,915	+14.27%
N. TOTAL DISPOSITIONS	726	271	1,193	15	9	2,719	120	894	302	2,331	1,064	2,986	2,263	1,171	16,218	14,066	+12.11%
O. Appeals Pending 6/31/76	738	104	2,011	17	4	1,500	158	4,130	428	3,709	1,259	7,724	741	2,492	22,038	19,100	+10.00%
P. DEFENDANTS AWAITING DISPOSITION	398	67	802	17	4	1,101	75	2,206	212	1,963	677	2,620	234	1,189	12,358	11,262	+9.1%
MANPOWER	JUDGE DAYS IN SUPERIOR COURT - CRIMINAL BUSINESS						PERCENTAGES OF TRIALS AND DISPOSITIONS										
Q. SUPERIOR COURT JUDGE DAYS	69	58	189	15	5	308	33	90	358	218	1,651	603	251	1,429	4,557		
R. DISTRICT COURT JUDGE DAYS	43	35	53	0	0	178	17	36	194	17	338	236	97	1,252	941		
S. TOTAL JUDGE DAYS	112	93	222	15	5	485	50	126	1,152	265	1,989	839	348	5,681	5,498		
PERCENTAGES	DE NOVO APPEALS						PERCENTAGES OF TRIALS AND DISPOSITIONS										
T. TRIALS APPEALS	9.7%	6.3%	2.2%	31%	33%	1.4%	13.3%	10.5%	9.0%	11.2%	3.3%	10.1%	20.5%	25%	8.4%	10.5%	
U. Dispositions	90.3%	93.7%	97.8%	69%	67%	98.6%	86.6%	89.5%	90.4%	88.8%	96.7%	89.6%	79.5%	95%	91.2%	89.5%	
PERCENTAGES	INDICTMENTS						PERCENTAGES OF TRIALS AND DISPOSITIONS										
V. TRIALS INDICTMENTS	9.6%	7.3%	4.5%	100%	0%	96%	16.5%	9%	3.9%	19.3%	7.6%	13.2%	16.0%	1.4%	11.4%	15.2%	
W. Dispositions	90.4%	92.7%	95.6%	0%	100%	90.4%	81.5%	91%	96.1%	80.7%	92.4%	86.7%	84.0%	98.6%	88.2%	84.8%	
TOTAL TRIALS	TOTAL TRIALS (CRIMINAL)																
X. INDICTMENTS	31	27	68	37	0	133	10	225	13	104	84	457	488	56	2,013	2,896	
Y. APPEALS	72	17	26	14	3	38	16	94	29	262	35	313	489	16	1,252	1,521	
Z. TOTAL	103	44	94	51	3	171	26	319	42	666	119	770	977	72	3,138	4,417	

TABLE 8

CIVIL BUSINESS SUPERIOR

	JURY CASES	Barnstable	Berkshire	Bristol	Dukes	Nantucket	Essex
A.	Civil Jury Cases Pending 7/1/75	750	824	1,954	15	0	5,692
B.	Civil Jury Cases Entered	310	256	723	22	16	1,456
C.	Civil Jury Cases in Progress (A&B)	1,060	1,080	2,677	37	16	7,148
D.	Jury Cases Disposed of	258	332	1,086	5	3	2,023
E.	Jury Cases Pending 7/1/76	802	748	1,591	32	13	5,125
	NON JURY						
F.	Civil Non Jury Cases Pending 7/1/75	1,247	412	1,270	103	0	4,192
G.	Civil Non Jury Cases Entered	668	256	1,048	36	24	1,434
H.	Civil Non Jury Cases in Progress	1,915	668	2,318	139	24	5,626
I.	Civil Non Jury Cases Disposed of	612	301	1,288	27	8	1,204
J.	Civil Non Jury Cases Still Pending 7/1/76	1,303	367	1,030	112	16	4,422
	MANPOWER						
K.	Superior Court Judge Days	77	104	297	15	5	480
L.	District Court Judge Days	0	0	0	0	0	10

cal districts, there should be a presiding or chief judge for each district. In addition, within each district of the court of original proceedings:

- (i) Departments should be established as convenience and efficiency indicate, with corresponding assignments of judges and auxiliary personnel. Such departments could include criminal, juvenile, general civil, short civil causes, decedent's estates, domestic relations, and the like.
- (ii) Subject to the general supervision of the presiding judge, an associate presiding justice should be appointed to administer each specialized multi-judge department.

The ABA standard does not cover our specialized Land Court since not every jurisdiction is as fortunate as Massachusetts to have had the foresight to have provided such a tribunal. Nor is there reference to the urban Housing Courts of this Commonwealth whose mission is to provide safe, decent and affordable housing in the urban areas.

These tribunals, to translate the ABA standard, which is the womb of the recommendations of the Select Committee, into something which could realistically be applied to the Commonwealth of Massachusetts would require the immediate re-subdivision of the proposed new court

COURT FISCAL YEAR 1976

Franklin	Hampden	Hampshire	Middlesex	Norfolk	Plymouth	Suffolk	Worcester	FY-1976 Total	FY-1975 Total	
199	3,246	397	12,700	4,215	3,481	15,489	4,010	52,972	50,985	
66	957	150	4,204	1,909	748	3,483	839	15,139	16,963	
265	4,203	547	16,904	6,124	4,229	18,872	4,849	68,011	67,948	
129	1,586	140	7,494	1,622	1,072	3,044	1,805	20,599	17,545	
136	2,617	407	9,410	4,502	3,010	12,107	4,622	47,412	50,403	
104	1,561	263	9,634	3,312	3,519	13,916	786	40,319	34,316	
95	652	192	2,500	1,231	1,119	4,419	2,272	15,946	15,284	
199	2,213	455	12,134	4,543	4,638	18,335	3,058	56,265	49,600	
55	1,047	144	3,006	849	503	2,238	1,480	12,762	10,013	
144	1,166	311	9,128	3,694	4,135	16,097	1,578	43,503	39,587	
40	222	28	836	296	242	1,207	273	4,122	4,186	
0	0	0	193	0	0	144	60	407	518	

into the very same divisions which are now known as the Superior Court (for general criminal and civil jury trials), juvenile (which would merely replace existing Juvenile Courts, probably without change of substance), probate (for decedent's estates and domestic relations), and our two highly specialized tribunals known as the Land Court and the Housing Court.

Someone must simply point out to the General Court that this procedure is cosmetic and that the hoped for "flexibility and efficiency" in the use of judges, clerks, courtrooms, and other resources, unfortunately, will not result.

Opposition to Unification

Elsewhere in this Report we have recommended the consolidation of the 72 separate District Courts into the DISTRICT COURT OF MASSACHUSETTS.

We do not recommend the unification of the Superior, Probate, Land, and Housing Courts. Such a unification, if it means the abolition of the Probate, Land and Housing Courts is not in the best interests of the citizens of the Commonwealth.

The interested observer should be aware of the salary schedules of the judges of the various courts.

Supreme Judicial Court	\$40,788
Appeals Court	37,771
Superior Court	36,203
Land Court	36,203
Housing Court	36,203
Probate Court	31,738
District Court	30,168
Boston Juvenile Court	30,778

The unification of the first tier of the trial courts would result in a forty-four hundred dollar increase for each judge of the Probate Court.

Assignment of Judges

Under the existing arrangements for the first tier of courts, it is possible for the Chief Justices of the various courts to determine whether or not it is feasible to transfer judges from time to time to assist the other courts in the dispatch of their business. We can see no reason why permissive legislation should not be enacted to allow this transfer procedure. The decision as to assignments, however, must be left to the Chief Justices of court systems involved in the request for assistance.

Those most ardent in support of the unification plan suggest that the judicial system manage its own internal affairs. Under the watchful eye of the Supreme Judicial Court and with the administrative competency now existing, and to be developed, in the office of the Executive Secretary, we believe that some judicial transfers can be made on an experimental basis. However, this is a stopgap measure and an insufficient and totally unacceptable solution to the need for an increased number of permanent judges in the Superior Court. Because of current workloads, it is unlikely that the Land Court judges will see much service in the Superior Court; it is even less likely that the Housing Court judges will be able to do much Superior Court work. How much neglect of probate matters can be tolerated to free the probate judges to assist the Superior Court?

The statistics of the Select Committee indicate that a judge of Probate in Middlesex County has a case load of 7,163 cases a year. This translates to 155 cases a week, 31 a day and 6 cases each hour during a normal scheduled work year.

According to the report of the Executive Secretary of the Supreme Judicial Court for the fiscal year ending June 30, 1975, there were a total of 102,333 petitions, libels, accounts, and civil complaints filed in

the various Probate Courts of Massachusetts. This means that there were 3,372 decrees and judgments per judge. How is it thought that the addition of these 102,333 cases to the 15,284 non-jury cases already filed in the Superior Court during the same period is going to make the expanded Superior Court more flexible and efficient?

The experimental transfer of District Court judges to sit in the Superior Court has crippled the District Courts; it would cripple the Probate Courts to undergo a similar experiment unless it were conducted under the strict supervision of the Chief Justices.

Use of Facilities

It seems to us that it is possible for the General Court to enact enabling legislation, if this is needed, so that the trial courts can share available court facilities. If such legislation were enacted, the Chief Justices and those on various court staffs would be able to efficiently use the existing facilities.

We have previously suggested this measure in our 51st Report for 1975.

In a speech on April 29, 1977, Chief Justice Edward F. Hennessey of the Supreme Judicial Court took note of the concerns of some that if the Probate, Land, and Housing Courts were "merged" into the Superior Court, "the expertise and distinct services of the specialized courts might be lost to the public." The Judicial Council had expressed such concern.

Chief Justice Hennessey commented that any reorganization should guarantee that the specialized courts should be preserved as distinct divisions of the Superior Court and District Court. The Chief Justice recommended a "Probate Division, Housing Court Division, and Land Court Division" of the Superior Court, and a "Juvenile Division" of the District Court, and that "no judge presently sitting should be moved away from his present special duties except with his consent."

The Judicial Conference has made a similar recommendation but no details have been suggested.

The proposal for divisions which was endorsed by the Judicial Conference failed to get the approval of the Chief Judge of Probate, Alfred L. Podolski and the Administrative Committee of the Probate Courts. Judge Randall of the Land Court and the other two judges of that court dissented on the basis that such a plan would threaten or at least weaken the excellent, unique land registration system of the Common-

wealth. The Judicial Council continues to oppose this proposed merger with or without divisions.

E. CONSOLIDATION OF THE DISTRICT COURTS

1. New Status of the District Courts

“most of the faults of our district courts can be traced to two things — first, their want of power and responsibility, and, second, their isolation from each other.”

Honorable Henry T. Lummus (1922)

The time has come for the next step to be taken to strengthen the second tier of Trial Courts in the Commonwealth. We recommend that the General Court create THE DISTRICT COURT OF MASSACHUSETTS, and that each division of that court be called THE DISTRICT COURT OF MASSACHUSETTS for the DISTRICT OF

We are convinced that the office of the Chief Justice of the District Courts is prepared for this consolidation.

It has been thirteen years since the function of the original administrative committee was vested in a Chief Justice of the District Courts. The present administrative committee acts as a council of advisors to the Chief Justice.

Not only have the rules of the District Courts been made far more uniform, but the careful attention paid to the administration of these courts by past Chief Justices, a tradition being carried on by the present Chief Justice, has paved the way for the consolidation which has been discussed for fifty years.

Truly this consolidation will be the last measure necessary to end the isolation of these courts from each other.

It will also make future progress far more of a certainty.

In the consolidation of the District Courts, we do not believe that the present concept of a presiding justice at a regular judicial base should be subjected to change.

The presiding justice is an important figure in the area in which he is located. He is a force for discipline, for leadership, and for public morality. It is necessary that this figure be given stability as far as this can possibly be done in a consolidated court. The presiding justice of each division, while he would be available for service throughout the system, ought to be regularly sitting in his “home” court.

A Note of Caution

We would like to repeat a warning which we stated in our 9th Report in 1933:

A note of caution should be sounded as to the legal aspects of some plans for rearrangement of our District Court structure which have been suggested.

The Commission on the Suffolk County Courts, of 1911, experienced some difficulty in drafting an act for the merger of certain existing courts which was then recommended. (See report, House Doc. 1638 of 1912, pp. 9-12 and 54-63.) The principal authorities furnishing guidance in the matter at that time were the cases of *Brien v. Com.* 5 Met. 508 and *Dearborn v. Ames*, 8 Gray 1. There is also the precedent in the federal judicial system of the continuance of the circuit judges, constituting the Circuit Courts of Appeal, after the circuit courts were abolished in 1912; and the additional precedent of the continuance in office as "circuit" judges of "the judges who served prior to its repeal under the act entitled 'An Act to Create a Commerce Court,' " etc., (See U.S. Code, Title 28, Secs. 213 and 214). It was decided in *Com. v. Leach*, 246 Mass. 464, that District Court judges may sit in the Superior Court for the retrial of misdemeanors. Since St. 1885, Chap. 132, every justice and, since St. 1906, Chap. 166 (now G. L. Chap. 218, Sec. 40), every special justice appointed to a district court has had jurisdiction by virtue of his commission, to sit in any district court in the Commonwealth, and since 1859 [See G. S. Chap. 119, Secs. 3 and 4 (now G. L. Chap. 217, Sec. 8)], every probate judge appointed has had jurisdiction in every Probate Court in the Commonwealth. While these precedents sustain the authority of the legislature to widen the jurisdiction of a court, the question seems still open in Massachusetts whether the legislature can provide, as congress provided, that a judge already in office may be continued in office by legislative act for the exercise of the widened jurisdiction, even though the particular court to which he was specially appointed might be abolished and this fact should be remembered in drafting any legislation of this character.

In view of the unfortunate results which might follow if an act affecting judicial power were determined to be unconstitutional after years of exercise, we think that no plan for combining courts, or for the continued use of judges whose court and judicial district have been abolished, should be adopted in any form which leaves open a reasonable doubt as to its validity without first requesting an advisory opinion from the Justices of the Supreme Judicial Court.

If a court is abolished by a statute which does not continue the judge in office, the judge would cease to be a judge, as was the case with the judge of the old Court of Common Pleas when that court was abolished and the Superior Court created in its place in 1850. It is a common tradition at the bar that one of the reasons for abolishing the Court of Common Pleas was a desire to get rid of some of the judges. Since the adoption of the 58th amendment to the constitution in 1919, we have had a simpler and more direct method of protecting the public service through the power of the

Governor and Council to retire a judge because of “advanced age or mental or physical disability.”

Juvenile Courts

It has been suggested that the Juvenile Courts of Boston, Bristol County, Springfield and Worcester be merged into the proposed DISTRICT COURT OF MASSACHUSETTS. We are of the opinion that the work of the Juvenile Courts, including the juvenile divisions of the District Courts, is an example of judicial specialization. It would be a great mistake to lump juvenile cases in with the general run of business of the District Courts. The number of juvenile complaints in fiscal 1975 in the Juvenile Courts is as follows:

Boston Juvenile Court	3,019
Bristol County Juvenile	4,433
Springfield	2,449
Worcester	<u>2,220</u>
Total	12,121

The number of juvenile complaints in the juvenile division of the District Courts for the same period was 37,306. The total number of such complaints is thus 49,427 and includes juvenile complaints for a variety of offenses, juvenile drug complaints, children in need of services, and care and protection proceedings.

While it may be wise to have Juvenile Courts come under the DISTRICT COURT OF MASSACHUSETTS for administrative reasons, we recommend to the General Court that the specialization of the judge who regularly deals with juveniles be preserved. The function of the judge in a juvenile proceeding only begins with the determination of guilt or innocence. The real function of the court is to find a way out for the young person and to set that young person on the right road. This task is difficult and, unfortunately, one in which in terms of human progress and happiness, the victories have always been surpassed by the defeats.

2. Consolidating Plan to Include the Boston Municipal Court

The Boston Municipal Court of the city of Boston is the busiest of all the District Courts. On the criminal side it disposes of over 10,000 criminal cases each year, apart from the moving traffic violations, and has civil entries equal to about one third of those in all 72 other District Courts of the Commonwealth. In addition to jurisdiction shared with other District Courts, the Boston Municipal Court has also been given broader jurisdiction over appeals under the civil service laws, motor

vehicle insurance laws, Employment Security Laws and the Workmen's Compensation Act. In civil cases, the Boston Municipal Court has much broader venue than the other District Courts. It is the only District Court which has its own Appellate Division for review of questions of law in civil cases. This court and its administrative problems are in many respects unique among the District Courts of the Commonwealth.

While the Boston Municipal Court is not now part of the District Court system, there has been a high degree of cooperation and uniformity of policy and practice between the B.M.C. and the other District Courts, particularly during the current administration of Chief Justice Lewiton. There have been occasional suggestions in the past that the B.M.C. be placed under the general administrative authority of the Chief Justice of the District Courts, as are the other 72 District Courts of the Commonwealth. However, because of the unique administrative problems of the B.M.C. and the progressive administration of that court, we believe that such a change would merely add to the administrative burdens of the Chief Justice of the District Courts, with no compensating advantages. This was also the view of the late Chief Justice Flaschner, who made it clear that he did not advocate or favor such a move.

On the other hand, if all of the District Courts of the Commonwealth were to be merged into a single "District Court of Massachusetts", the inclusion of the Boston Municipal Court in that single court would appear to be a logical step.

3. Expansion of the Jurisdiction of the District Court

The philosophy behind various proposals in bills filed in the General Court in recent years, and now found in the Report of the Select Committee, is to channel all cases involving less than ten thousand dollars (\$10,000) to the District Courts.

The present situation is that in cases where the amount involved is less than four thousand dollars (\$4,000) the case can be sent for trial in the District Court by a remand order from the Superior Court.

A claim, in any amount, can be filed in the District Court and there tried to a judgment unless the defendant desires a jury trial. Many insured defendants file a jury trial claim and remove the case to the Superior Court for trial, only to find that, because the claim is under \$4,000 (formerly \$2,000 prior to 1974), it is sent back to the District Court for trial.

For many reasons we do not recommend the increase of the jurisdic-

tional amount to \$10,000 nor do we recommend that consumer claims cases or other judicial business be diverted to the District Court if the controversy involves substantial sums.³

The statistics of the Executive Secretary demonstrate that the number of remands between 1965 and 1975 were 128,875 to the District Courts and the Boston Municipal Court. In the same period 19,774 cases were returned after District Court trial for a jury trial or for other disposition in the Superior Court. This experience seems to indicate that about 85% of the cases ended in the District Court without a later jury trial in the Superior Court. There are no accurate statistics on the number of retransferred cases which were actually tried in the Superior Court. We have attempted to ascertain this number in the past years but have not been able to develop accurate data. This number, however, is small.

In the same period 109,176 cases were removed from the District Courts to the Superior Court and some of these were of course transferred back where the claim was under the, then, \$2,000 limit.

We note that with the remand figure at \$4,000 there are significant decreases in remanded cases, and that the Executive Secretary has not yet made the determination as to why this decrease has occurred. After the advent of no-fault insurance, remands dropped 60% in two years and removals decreased by about the same amount.

Since we do not recommend civil jury trials in the District Courts, we reach the conclusion that there will be a sizeable number of cases in which a jury trial will be involved and which cannot be remanded, and that the case involving a claim in excess of four thousand dollars (albeit a somewhat arbitrary amount) does not belong in a sub-system which must utilize its resources for a huge quantity of business, both civil and criminal.

4. Regional Divisions of the District Court

We support the idea of appropriate regional organization for the present District Courts or for the proposed DISTRICT COURT OF MASSACHUSETTS, and we refer to the "*Standards Relating to Court Organization*" of the American Bar Association published in 1974 where it is said in section 1.12 (c) that in a unified system of trial courts, and the new DISTRICT COURT OF MASSACHUSETTS would be such a unified system:

... traditional local government boundaries do not, as such, retain

³Chief Justice Lewiton favors the proposed increase to \$10,000.00 with respect to remanded cases. He also favors concurrent jurisdiction in the District Court of monetary claims under G.L. Chapter 93A but excluding equitable relief and class actions.

functional significance. To the extent feasible, the trial court should be organized as a single unit with all its judges and auxiliary personnel under a central administration. Such an arrangement makes it possible to eliminate imbalance in workloads, conflicts in procedure and policy between trial courts, and inefficiencies in transfer of cases and other processes requiring lateral cooperation. It has proved practicable in New Jersey, a state large in population, and Alaska, the new state largest in geographical size. It is the distinctly preferred organization for trial courts in states that do not have two or more large regional population concentrations.

The study by the ABA further indicates that if a single administrative organization is provided, the system should be further organized into a relatively small number of regions. (Sec. 1.12 (d))

There is no immutable plan for the drawing of regional lines. The ABA *Standards* says:

In any event, each district into which the court of original proceedings is organized should have a presiding judge who is invested with administrative authority and responsibility for its management.

The precise method for such geographical regions and their administration should be left to the office of the Chief Justice of the District Courts, in cooperation with the Office of the Executive Secretary.

5. Jurisdictional Boundaries of the District Courts

The territorial jurisdiction of the several District Courts is established under Chapter 218, Sec. 1 which also establishes the jurisdiction of the Municipal Court of Boston. The place where such courts shall be held is likewise prescribed by this statute. In those cases in which the territorial jurisdiction of a District Court has been changed, and in instances in which the place for holding court has been altered, an act of the General Court has been required. In the twenty year period between 1956 and 1976 there were at least 17 changes affecting the territorial jurisdiction of the District Courts.

Proposals to permit the Chief Justice to re-designate the territorial lines of the existing districts, which would, we hope, be the original geographical districts in the new DISTRICT COURT OF MASSACHUSETTS, would be a departure from the traditional methods of defining such territorial limits.

From the management point of view, it would be wise to permit the Chief Justice to determine how the system can best serve the people. Few major shifts of jurisdictional area would seem possible in view of the present location of the courts. It is, therefore, not only possible, but necessary that some courts should be merged.

We support the concept that the Chief Justice and the Administrative Committee of Advisory Justices should have authority to redraw the lines and to merge the smaller courts into larger administrative units. In all this, the convenience of the public should be the main concern. More efficient and less expensive operation of some larger unit of the system may in turn allow for the expansion of service to the public. No Chief Justice can create a court or act in any manner inconsistent with the constitutional duty of the General Court, which alone can "erect and constitute judicatories".

6. Certification of District Court Judges to Sit in Superior Court

Chapter 303 of the Acts of 1976 which provided that as many as twenty-five District Court justices might sit in the Superior Court upon authorization of the Chief Justice of the Supreme Judicial Court and assignment by the Chief Justice of the Superior Court will expire on June 30th, 1978.

We do not recommend any extension of this legislation. We are of the opinion that this temporary measure has demonstrated the great need for additional judges in the Superior Court, and that a more permanent solution is now required.

F. JUDICIAL POLICY MAKING AND ADMINISTRATION

1. The Role of the Chief Justice of the Supreme Judicial Court as Manager of the Judicial System

It is the opinion of the Select Committee that "The Chief Justice of the Supreme Judicial Court should be designated, by statute, the chief executive of the Massachusetts courts."

Although we agree that the near unanimous conclusion of all authorities on judicial administration is that the judicial system requires "over-all executive management", and a coordinated administration, it does not necessarily follow that this role must be filled by the Chief Justice of the Supreme Judicial Court. Here, again, we speak of the measure and not the individual.

In some of the prior studies referred to by the Select Committee, the recommendations for executive management were for a different kind of plan. In the *Report of the Judicial Survey Commission* (the Herter

Note: We have considered House bill 1951 of 1976 which provides for the regionalization of the District Courts, and for a new method of management of and funding for the District Court system. In view of the fact that we have recommended a consolidation of the District Courts into a single District Court of Massachusetts, and have also recommended a single judicial budget, with state assumption of all court costs as a goal, we do not make detailed comments on House bill 1951, nor is the bill reprinted in this Report.

Commission) in 1956, House Doc. No. 2620, at page 43, the recommendation was:

We believe that the Supreme Judicial Court should have final administrative and supervisory authority over all the other courts of the Commonwealth, with full rule making power.

We have recommended that an administrative office of the courts, with a competent administrator receiving not less than \$15,000 a year (1956 dollars) be appointed to assist the court in the exercise of these powers.

On page 36 of this 1956 report the Commission said: —

The administrator would be the eyes and ears of the Supreme Judicial Court. One of his first duties would be to find out what it really does cost to run the judicial system. He would also take the responsibility for the collection of statistics about the work of all the courts.

As indicated by the publication of the 19th Report of the Executive Secretary, for 1975, he has now succeeded in both tasks and has attempted many more.

When the Judicial Council considered the Unified Court idea in 1935, we made this observation:

The Supreme Judicial Court must not be overloaded with work or responsibility. If the court adopted the practice of the New York Court of Appeals, which in 1934 wrote opinions in only about 30 percent of the cases submitted and were content with memorandum decisions in the rest, it would be relieved of much labor. It is doubtful if in every case the parties are as much concerned with reasons as with decisions. A very, very small percent of cases actually tried in the courts of the Commonwealth ever reach the Supreme Judicial Court. In all the rest litigants seem to be content without any opinion, or with the briefest sort of memorandum by a trial judge.

We are not content to have our Supreme Judicial Court become an institution which merely issues rescripts announcing decisions, nor are we content to have our Chief Justice deprived of the opportunity to fully participate in the work of the court and particularly in the writing of opinions. The opinions of our Supreme Judicial Court guide the daily lives of more than five and one half million people, a fact which may escape notice at a time when the spotlight is on the possible executive function of the person holding the office of Chief Justice.

Policy Making

We are curious as to why the Select Committee paid such little attention to the recommendations found in the 1974 American Bar Association *Standards Relating to Court Organization* under the head-

ing “Unified Court Structure” par. 1.11 (d) which reads:

(d) Clearly vested policy-making authority. Responsibility for making policy, including regulations concerning court administration and participation in making procedural rules should be vested in the State’s highest court or in a council composed of judges.

In the commentary on this Standard which appears at page 14 of the *ABA Standards*, it is said:

The authority to prescribe administrative regulations for the courts should be vested in a body that is at the same time fully conscious of the need for centralized guidance of a court system and sufficiently cohesive to discharge its responsibility effectively. In some court systems, the policy making body is the State’s highest court acting in a quasi-legislative capacity. In other court systems, the policy making body is a council, usually denominated the Judicial Council, composed of judges representative of the various courts in the system.

In Massachusetts, this body is the Judicial Conference.

Again, in the *ABA Standards Relating to Court Organization*, it is specified in Section 1.32 at page 76 that:

The authority to make policy for administration of the courts, provided in Section 1.11 (d) (quoted above) should be vested in a judicial council representative of all the courts of the system or in the members of the Supreme Court sitting as a judicial council. The chief justice should be the council’s presiding officer. The council should prescribe policy in the form of rules and regulations and should obtain staff and research assistance in developing policy and evaluating its effects.

It was also observed that:

All judges and judicial officers of the court system should share in deliberations and discussions concerning the procedure and administration of the courts. They should meet in conference from time to time, at least annually, and should make recommendations concerning court administrative policy and should have opportunity to review and comment upon proposed procedural rules and administrative regulations. The presiding officer of the judicial conference may be the chief justice or may be elected by the conference itself.

This is the present function of the Judicial Conference of Massachusetts. The Massachusetts Judicial Council observes the work of the courts and reports to the Governor and the General Court.

A Differing Opinion on the Role

While some would urge that the Chief Justice of the Supreme Judicial Court be the supreme judicial magistrate, after the manner of calling the governor of the Commonwealth “the supreme executive

magistrate”, the Judicial Council has some differences of opinion.

1. We believe that the power of superintendence ought to be exercised by the Supreme Judicial Court as a whole.
2. We see the role of the Chief Justice as one on the policy making level, as head of the court, and as chairman of the Judicial Conference.
3. We think that the power of assignment of judicial personnel in the trial courts should lie with the Chief Justices of the trial courts and not with the Chief Justice of the Supreme Judicial Court and that the assignment of court personnel, other than judges should be de-centralized in operation.
4. The Supreme Judicial Court and the Chief Justice, as its head, would strictly control the Executive Secretary or Court Administrator in the discharge of all his duties.
5. The Chief Justice would be a spokesman for the judicial system, but should not attempt to participate directly and personally in the legislative programs presented before the committees of the General Court.
6. The Chief Justice should give a strong leadership to the Judicial Conference and to the conferences of policy making Chief Justices who head the sub-systems.
7. We think it apparent that the Chief Justice must delegate much responsibility; we think the structure of responsibility for the operation of our judicial system should not be left to the discretion of any one individual.

We think that the investment of total authority for the general supervision of the court system in the Chief Justice of the Supreme Judicial Court of Massachusetts, who is appointed for life, so to speak, and until now without regard for administrative ability, is ill-advised.

We note that in the ABA *Standards* (Sec. 1.33) it is assumed that the Chief Justice who would have this executive authority would be (1) elected for a period of five years to the post, (2) be selected not only for intellectual skill but for administrative ability, and (3) be chosen by election by his court or by a judicial nominating commission.

Chief Justice Edward F. Hennessey of the Supreme Judicial Court took notice of the concern that in any court reorganization too much power might be concentrated in the hands of one person. In his annual report, “The State of the Judiciary” for 1976, p.2, the Chief Justice said:

Important administrative decisions should not rest solely in one person. Checks and balances can be established without diluting the benefits of centralized management. For just one possible arrangement: most major decisions might originate with the trial court chief justices assisted by the recommendations of their

administrative committees, but subject to approval by the Chief Justice of the Supreme Judicial Court. Major decisions which must originate with the Chief Justice of the Supreme Judicial Court, such as those which relate solely to administration of the Supreme Judicial Court, might be subject to approval by the full bench of the Supreme Judicial Court.

At its meeting on April 27, 1977, the Judicial Conference endorsed a resolution which said, in part:

As to centralized management, the Conference urges that the administrative decisions traditionally made at the trial court level shall continue to be made at that level. If it is preferable that there be approval by administrative committees of trial courts; approval by the three chief justices (the two trial chief justices, and the Supreme Judicial Court Chief Justice); approval by the Chief Justice of the Supreme Judicial Court alone.

The reference to the "two trial chief justices" in the resolution of the Judicial Conference supposes a single Superior Court with permanent and separate divisions for Probate, Housing, and Land Court.

Recommendations of the Judicial Council

Elsewhere in this Report we have discussed the enlargement of the staff and mission of the office of the Executive Secretary of the Supreme Judicial Court.

In our 51st Report for 1975 we noted that there was a bill pending before the General Court which would have changed the name of the office of the Executive Secretary to the "*Administrative Offices of the Massachusetts Courts*."

We said that such a change would make it clear that this office is the foundation for a strong administrative office which would be responsible not only to the Supreme Judicial Court but also to the General Court.

It is idle to make a recommendation that the Chief Justice of the Supreme Judicial Court be the "chief executive of the Massachusetts Courts". This is to assign the Chief Justice to make a war without an army, or, at very least, without a general staff.

The present office of the Executive Secretary consists of 20 people of whom 13 are there only because the Executive Secretary has been able to persuade the LEAA to provide federal funds for their salaries.

The situation in this agency is aptly explained in par. 14 of the Report of the Select Committee. We are aware that the proper expan-

sion of this office may require an additional appropriation of \$1,000,000.00 a year. The expenditure of such a sum for proper management assistance to the court staffs throughout the Commonwealth is a wise investment of tax dollars and we recommend it.

Until the Administrative Office of the Courts has an independent capability for the sort of function described in the Report of the Select Committee, we decline to see the Chief Justice of the Supreme Judicial Court become the "Chief Executive". A chief executive who must depend on a statutory staff of three people and his executive secretary, and such others as he can cajole or beg, is but a paper tiger.

Unless and until the administrative office is properly established, we believe that the Chief Justice of the Supreme Judicial Court, and the Judicial Conference of Massachusetts existing under Chapter 211, Sec. 3F should be formalized and expanded and assigned the function specified in the ABA "*Standards Relating to Court Organization*", which we have quoted above.

2. The Management of the Superior, Probate, Land and Housing Courts

The Chief Justices of the Superior Court and the Probate Court, the Judge of the Land Court, and justices of the Housing Courts are directly responsible (as is the Chief Justice of the District Court) for the management of their courts within the limits of the policy established by the Supreme Judicial Court, and in accordance with standards and procedures adopted by the office of the Executive Secretary and sanctioned by the Supreme Judicial Court and the Judicial Conference.

Each Chief Justice should have these responsibilities:

1. The assignment of judges and other personnel.
2. The general supervision and management of the court budget.
3. Policy making for the court.
4. Formulation of procedural and administrative rules.
5. A case management system.
6. In conjunction with the office of the Executive Secretary Administrator, the adoption and application of personnel policies, standards for records, supportive services, court facilities, and court personnel including probation officers, court reporters, court officers, and others.
7. Maintenance of close liaison with the Chief Justices of other sub-systems; encouragement of conference of judges, educational seminars, and staff meetings.
8. Representation of the court in public affairs.
9. Planning and Research.
10. Leadership of the court, professional excellence, and preservation of a suitable code of judicial ethics.

There are probably many more areas of responsibility for a Chief Justice and in each instance his or her duties would be discharged with the aid of an administrator and staff. In the very small courts such a staff would be unnecessary.

3. Regional Administrators Concept

It has been suggested that "it's most unlikely" that the Chief Justice of the Superior Court would be able to "effectively administer the flow of business and the personnel and facilities of the Superior Court in each of fourteen counties."

Those who propose the plan well defined in the American Bar Association "*Standards Relating to Court Organization*" and explained in sections 12 and 13 of the Report of the Select Committee, have the goal of establishing "judicial regions." These regions could be established along the lines of the regions now used in the executive branch for various activities of state government. Ultimately one trial court judge, it is suggested, would fill an administrative role, probably for a one year term, in each of the regions.

To establish such regions it would be necessary to eliminate the present system of county institutions and government.

We do not believe that this Report of the Judicial Council is the place to debate the question of the abolition of county government. Until a decision is made in this regard to the effect that county government (at least in connection with the courts and their facilities) is to end, and until there is a strong central administrative office for the courts (which does not now exist) and until the state has assumed the entire cost of the judicial system, we do not see a necessity for regional administrative judges for the Superior Court. The time to consider this concept is after the administrative foundation has been built.

G. MANAGEMENT OF CRIMINAL BUSINESS IN THE DISTRICT COURT

1. Trials by a Jury of Six in Criminal Cases

Although the number of criminal entries in District Courts⁴ for the 1975 fiscal year was a total of 613,753, the significant cases are in these categories which are handled by a judge:

a. General Criminal Complaints	157,291
b. Narcotic cases	15,253
c. Gaming or Lottery	1,104

⁴These statistics do not include Boston Municipal Court

d. Operating under the Influence of Liquor	16,290
e. Operating Under the Influence of Drugs	286
f. Operating to Endanger	13,034
g. Use without Authority and Larceny of motor vehicle	<u>5,304</u>
TOTAL	208,562

Of these 208,562 criminal cases, 16,487 were appealed to the Superior Court after a guilty finding. This number amounts to 7.90% of total "judge handled" criminal cases. It is probable that 14% (1,879) of these appealed cases will actually be tried in the Superior Court and that not all of these trials will be before a jury. The remainder of these cases (14,608) will be disposed of by a judge of the Superior Court or possibly by a District Court judge sitting in the Superior Court. Can we retain these cases in the District Court, or at least the vast majority of them?

2. Elimination of the Trial De Novo

In our 51st Report for 1975 we said that the two-tier system in Massachusetts has made it possible for District and Municipal Courts to dispose of approximately 92% of all of the substantial criminal complaints without adding to the burden of the Superior Court. In the fiscal year ending June 30, 1975, the District Court judges handled 208,562 criminal complaints. Of this number, 16,487 were appealed to the Superior Court, or approximately 8%.

The necessity of preserving this capacity of District and Municipal Courts to dispose of approximately 90% of all future criminal complaints must be given careful consideration in connection with any proposal to change the present system of handling criminal cases.

It is our position that the trial de novo in the Superior Court should be retained for the present time,⁵ but we also recommend that a defendant in a criminal case be given a choice at the outset:

1. The defendant may request a jury of six in the District Court. If he is found Not Guilty, he goes on his way. If he is found Guilty, the case is disposed of in the District Court unless the defendant claims an error of law has been committed. There would, then, be appellate review by the Appeals Court.
2. In lieu of the jury of six, the defendant may choose a bench trial with no jury. If convicted, the defendant could appeal for a trial de novo in the Superior Court, as in the current practice.

⁵Chief Justice Lewiton favors giving to the District Courts exclusive jurisdiction of de novo appeals.

We realize that it has also been recommended that there be a third procedure wherein the defendant could (1) have a bench trial and (2) if convicted have a jury of six in the same District Court.

If facilities exist for a jury of six in the District Court in some criminal cases, there is no reason why the trial cannot take place there. We cannot be sure that such facilities do exist in all areas where they may be needed. Criminal cases could be tried to a jury of six at a central location within the county without presenting significant problems. In other cases there may be many difficulties.

Experience indicates that approximately five percent of judge-handled criminal cases are later tried to a jury. It is probable that, if trial de novo is eliminated, the number of jury claims will be far higher than five percent, and may go as high as fifteen percent or more.

It is also possible to designate classes of cases where a de novo trial might still be allowed in the Superior Court while requiring all other cases to have the jury trial in the District Court.

We do not favor an immediate total abolition of de novo appeals, but we wish to encourage viable alternatives.

3. Decriminalization of Minor Motor Vehicle Offenses

The Report of the Select Committee recommends the "decriminalization" of minor motor vehicle offenses and suggests that such cases be dealt with by the use of civil penalties.

Because of the expected new burden of judicial business brought on by reason of the recent legislation requiring surcharges on insurance policies in the event of a conviction of "moving" violations the so called "decriminalization" has a certain appeal.

The appeal, and the idea of "decriminalization," stems from the fact that the infraction would be dealt with by a judge in the District Court at a bench hearing. We are not "sold" on any general "Pay by Mail" scheme.

An excellent discussion of this idea appears in a report of the Department of Public Works in 1929 at which time the Department of Public Works recommended the "decriminalization" of minor motor vehicle infractions. (Senate Doc. No. 5 of 1929)

Some things should be kept in mind in connection with this concept.

1. The offender should not be given license to disobey the motor vehicle laws merely because he can pay the civil penalties involved. Possibly he or she should have the benefit of the doubt on a first, second, or even third offense, but after three

“strikes” the safety of the rest of the citizens of Massachusetts is better guarded if the criminal process is used.

2. The offender should probably have the right, at least, to a jury of six in the District Court. While it may be true that the constitution does not require a jury trial in such cases, the experience of most of us is that there is more than a reasonable likelihood of a guilty finding at a bench trial. Since substantial insurance premium penalties might be involved, the individual should be given an election.
3. The civil penalty idea should not be used where the violation indicates a direct disregard for the safety of the public, or where there is a definite criminal intent.

When in our 51st Report for 1975 we had occasion to discuss similar, but more far reaching, legislation along these lines we said:

In the opinion of an experienced District Court judge who daily handles the criminal business of a metropolitan district court, many persons who would be allowed by this proposed statute to pay fines by mail or otherwise avoid an actual appearance before the Court should be obliged to undergo the experience of coming into court and making a public answer for their conduct. In some instances, such an appearance in Court would be the jolt that an individual might need to convince him to take a healthier attitude towards his fellow man.

We make special note of the fact that in the case of the automobile violations, a copy of the citation is also sent to the Registrar of Motor Vehicles and becomes part of the permanent file of the offender. It is probable that this factor of the present “traffic ticket” serves as a great deterrent to the normal person and even more so than the small fines.

4. Non-Support Complaints

There appears to be some misconception about the work of the Probate Courts with respect to proceedings for the support of wives and dependent children. In the fiscal year 1975 there were 5,801 petitions for separate support and 858 petitions for contempt for failure to pay what was ordered by the court. In connection with divorce proceedings there were 4,326 contempt proceedings (not including a very large number in Suffolk County) most of which probably dealt with the support question.

Payment of support may be compelled in the Probate Court by filing a petition for contempt. The total number of such cases in the Commonwealth (excluding Suffolk County) in fiscal 1975 was 5,184. For the same period a total of 3,557 “Non-Support” cases were filed in the District Courts and resulted in the payment of \$6,577,269 for family support. In addition, there were 1,493 cases brought in the

District Courts under Chapter 273A, the Uniform Reciprocal Support Act. These proceedings brought \$4,559,365 to families and children. We cannot calculate the amount of support money "collected" by the Probate Court but, \$11,136,364 was collected by proceedings in the District Courts during fiscal 1975.

It is necessary for any court to have the power to enforce its own decrees and the contempt proceedings available in the Probate Court permit this to be done in connection with proceedings for separate support and divorce. There are no such proceedings affecting marriage in the District Court.

Over the years many have urged the creation of a FAMILY COURT consisting of the Probate Courts and the Juvenile Courts to deal with all matters involving the family unit. In all events, we do not recommend the transfer of all cases for the enforcement of support orders to the District Courts, now, or as consolidated.

It is suggested by the Select Committee that all non-support cases be heard on the civil side of the District Courts, and that enforcement of support decrees of the Probate Court be transferred to the District Courts. While there would doubtless be some advantages in having all non-support matters handled in a single court, there are other considerations militating against transferring enforcement of probate support orders to the civil side of the District Courts. In its Report, the Select Committee refers to confusion and other problems experienced by the Probate Courts in the use of contempt proceedings to enforce such orders. Yet there is no suggestion that confusion or problems would be any less prevalent in the handling of contempt proceedings in the District Courts. Moreover, problems of enforcement of probate support orders are often inextricably intertwined with problems of custody of minors, visitation rights, use of jointly owned property, and similar matters, control of which would be retained by the Probate Courts. To separate the support orders in such cases and have them enforced in the District Courts, where consideration of the related problems would not be possible, would be undesirable. Moreover, the suggestion by the Select Committee that probate support orders should be subject to modification by both the Probate Courts and the District Courts would certainly tend to create at least as much confusion as is now said to exist under current procedures.

In our opinion, enforcement of Probate support decrees should remain in the Probate Courts.

H. MANAGEMENT OF CIVIL BUSINESS IN DISTRICT COURT

I. Trials by a Jury of Six in Civil Cases

We are of the opinion that there should be no right to jury trials in civil cases in the District Courts, lest the present capacity of those courts to dispose of large volumes of cases, civil and criminal, be destroyed. While it is argued in the Report of the Select Committee that the present procedures involve a great waste of judicial time, we believe the opposite to be true.

For one thing, it is *not* a fact, as there stated, that in civil cases brought and tried in the District Courts, the losing party is entitled upon request to a trial *de novo* in the Superior Court. In cases involving more than \$4,000 brought and tried in the District Courts, neither party has a right to a new trial in the Superior Court. In cases involving less than \$4,000 brought and tried in the District Courts, the plaintiff, by bringing the action there, waives his right to removal or trial by jury, but the defendant against whom a finding is made in such a case in the District Court, is entitled to a re-trial in the Superior Court, but *not* a trial *de novo*. The adverse finding in the District Court is *prima facie* evidence against them in the later Superior Court trial. The combined effect of these conditions is that *very few* of such cases tried in the District Courts are ever re-tried in the Superior Court. The burden of two trials in these few cases, where they do occur, is greatly outweighed by the time saved through final disposition of the great mass of civil actions by bench trials in the District Courts.

It is fairly predictable that if an option were to be given to either party to insist on jury trials of a civil action in the District Court, large numbers of jury trials would be required. For example, it is likely that many young, inexperienced lawyers would claim jury trials, even in simple collection cases now disposed of expeditiously, merely for the sake of gaining experience in the trial of jury cases. While we are straining to find means of relieving congestion in the courts, it would ill-behoove us to change our procedures so as to encourage time-consuming jury trials in civil actions in the District Courts and thereby destroy their present capacity to dispose of a large volume of civil actions by bench trial.

We fully recognize the constitutional right of litigants in civil actions to have jury trials. On the other hand, we think it would be undesirable to encourage litigants who are now willing to have their cases tried without a jury to claim jury trials and thereby add to existing congestion. In this connection, we have noted the suggestion

by Chief Justice Warren E. Burger of the U. S. Supreme Court at the recent National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice that the right of jury trial in civil cases may not be worth the tremendous court backlog to which it has contributed. While we favor the retention of the constitutional right of civil litigants in Massachusetts to demand trials by jury, we do not think it desirable to encourage the large number of litigants who are presently satisfied to try their cases before a judge in a District Court without juries, to claim jury trials in such cases. It would only result in an intolerable increase in court docket congestion.

Apart from the foregoing considerations, the increased costs involved in providing jury trials, even if courtrooms suitable for jury trials were available for the large volume of civil actions now disposed of by bench trials in the District Courts, would be astronomical. We see no justification for adding these costs to the burdens now carried by the harried taxpayer.

2. Consumer Cases (Chapter 93A) under \$10,000

It is proposed in the Report of the Select Committee that claims under the "Consumer Protection Act", Chapter 93A, be brought in the District Courts if the amount involved is less than \$10,000. This statute now requires such cases to be filed in the Superior Court. The proceedings under this statute are in Equity. The principal concepts in the enactment of this legislation were to permit the attorney general to restrain deceptive trade practices, and to permit persons to join with others in class actions to prevent the continuance of such unfair or deceptive practices, as well as to obtain damages for loss already suffered.

In our 49th Report for 1973, we indicated that we did not think that a statute which would grant the District Courts jurisdiction to give such Equity relief should be enacted.

This type of action is one which, by reason of Section 9, requires a consumer to give notice to the seller, supplier, or merchant of the alleged deception, and an opportunity to correct it. If this opportunity is not taken by the seller or supplier of goods or services, or other person, the consumer's best weapons are (1) the right to an injunction, (2) the right to commence a class action, and (3) the possible intervention of the attorney general.

We think this class of cases should remain in Superior Court, and that the mere jurisdictional amount should not necessarily control.⁶

⁶The position of Chief Justice Lewiton is set forth in a footnote on page 54.

The court must protect the right of both parties in such an action while discouraging insubstantial claims. Such cases are akin to those where individuals have the right to join with others in the Superior Court in an action to protect the environment.

3. Equity Appeals in Zoning Cases

It is apparent after a review of the history of zoning appeals in this Commonwealth that the disposition of petitions for variances, special permits, and site plan approval are often decided in the local Zoning Board of Appeals on issues which are often based on expediency, local conditions, or even politics. It is only when such decisions are challenged in the courts that the more serious legal problems arise for judicial determination.

Under the provisions of Chapter 40A, Section 17, as amended by Chapter 808 of the Acts of 1975, the court shall then:

Hear all evidence pertinent to the authority of the board or special permit granting authority and, upon the facts so determined, annul such decision if found to exceed the authority of such board of special permit granting authority or make such other decree as justice and equity may require.

Feelings in such cases run high at the local level. The board of appeal may include a lawyer of great local prominence and the town counsel is a person of high standing. The petitioner who has sought the variance of special permit may be well financed and well connected. The pressures on the local District Court are such that we are of the opinion that the judicial decision should be made by a justice of the Superior Court, and the judicial hearing should be held in that higher tribunal.

If the General Court wished to lessen the amount of time which is necessarily consumed in the hearing of the zoning appeal, certain measures could be adopted to expedite the procedure. By amendment of Section 17 of Chapter 40A, it could be provided that (1) the petitioner for a variance or special permit would pay the cost for a stenographic record in the proceedings before the Zoning Board of Appeal, and this record would be evidence in the judicial proceeding; (2) the city or town would be required to submit accurate copies of all relevant by-laws and regulations; (3) all exhibits used by either party before the Zoning Board of Appeals would be marked and become evidence in the judicial proceeding; (4) each party to the appeal would be required to submit a brief of law and a factual summary together with a detailed claim of the alleged errors of the Zoning Board of Appeal; (5) all these

matters would be considered by the judge prior to the reception of additional testimony and evidence from any party.

The present de novo trial of a zoning appeal case in the Superior Court is both time consuming and expensive. It would serve all parties, and lessen the expense, if much was done prior to the commencement of the de novo hearing. The General Court might also explore a procedure wherein the Superior Court would merely review the decision of the Zoning Board of Appeal for errors of law, but the aggrieved party should be entitled to submit additional evidence on the propriety of the proceedings and the correctness of the decision as a matter of law.

We are convinced that such appeals belong in the Superior Court.

Zoning appeals may take several days trial time in the court and in our opinion they should not be tried in a court system, such as the District Court, where the emphasis is on the disposition of a large volume of cases.

The value of the community based District Court would be diminished if it were to become involved in highly emotional cases such as the trial de novo in a zoning situation.

I. CASE MANAGEMENT AND RULES OF PROCEDURE

We observe that in the many recommendations for the more efficient management of cases, the role of the judge is neglected. Final decisions on the trial list, readiness for trial, and all pre-trial motions of any significance must be made by a judge. It is possible that a clerk might be of assistance with such procedural matters, when in fact they are *merely procedural*. For decades it has been the practice of experienced clerks, with the concurrence of the bar, to deal with uncontested motions and other uncontested pre-trial matters.

The suggestions that there be more pre-trial conferences and sessions for conciliation and mediation do not fall on deaf ears. We suggest, however, that it is difficult to establish excellence in case management with the present number of judges.

If we must select between the appointment of new magistrates for our Superior Court, and the addition of more judges, we would support the addition of more judges who could perform all of the duties of judicial office, not merely a few minor duties.

We think it necessary to observe that a worthwhile person, who should be a member of the bar, ought not to be employed as a magistrate at a *starting salary* of less than \$25,000 a year.

APPENDIX

DISTRICT COURT STATISTICS 1975 AND 1976¹

Civil Business	1975	1976
1. Civil Cases Entered	74,015	80,523
2. Civil Trials Held	8,401	6,890
3. Percentage of Cases Tried	11.4%	8.56%
4. Eviction Cases Entered	14,562	16,874
5. Eviction Cases Tried	4,537	5,461
6. Percentage of Evictions Tried	31.2%	32.36%
7. Cases Removed to Superior Court	4,537	2,459
8. Small Claims Filed	11,036	116,737
9. Decisions Reviewed by Appellate Division	192	105
10. Decisions Appealed to Supreme Judicial Court	9	15
Criminal Business		
11. Criminal Cases Entered including "Pay By Mail"	613,753	692,954
12. Criminal Cases Appealed to Superior Court	16,487	15,660
13. Percentage of Cases Appealed	2.68%	2.26%
14. Auto Violations Except Parking	440,105	475,651
15. Auto Violations Percentage	71%	68.64%
16. All Juvenile Proceedings	36,664	34,633
17. Drunkenness Cases	NON-CRIMINAL	

CASES HANDLED BY A JUDGE — THE SIGNIFICANT 8% APPEAL RATE

Although the number of criminal entries in district courts for the last fiscal year was indeed a total of 692,954 the significant cases are in these categories which are handled by a judge.

	1975	1976
a. General Criminal Complaints	157,291	166,705
b. Narcotics cases	15,253	13,921
c. Gaming or Lottery	1,104	1,249
d. Operating Under the Influence of Liquor	16,290	17,735
e. Operating Under the Influence of Drugs	286	259
f. Operating to Endanger	13,034	12,258
g. Use Without Authority and Larceny of Motor Vehicle	5,304	5,172
TOTAL	208,562	217,299

¹These figures do not include the Boston Municipal Court, but they are illustrative of the problem there.

The balance of the criminal cases (475,655) include all the auto violations which, under G.L. ch. 90C, Sec. 4A, can be disposed of by the Clerk of Court or the clerical staff. The problem area seems to be in the above 217,299 figure.¹

As 15,660 of these 217,299 cases were appealed to the Superior court for a de novo trial, we find that the rate of appeal is much higher at 7.21% based on the 217,299 figure while appearing to be only 2.26% if the misleading 692,954 total is used as the measuring base.

These profiles tell much about our District Courts, but a study of the whole picture requires a detailed examination of all the statistical indicator published by the Executive Secretary of the Supreme Judicial Court.² Among other things, the District Courts collected \$2,058,546 from parking “tickets”, and \$10,912,692 in family neglect and nonsupport cases in fiscal 1976.

Other Recent Trends

The statistics for Operating To Endanger and Driving Under The Influence cases show significant trends:

Negligently Operating So As To Endanger

<u>YEAR</u>	<u>NUMBER of Cases</u>
1971	8,336
1972	9,963
1973	10,980
1974	12,230
1975	13,034
1976	12,258

This is a 63.9% increase in six years.

Operating Under The Influence

1971	9,105
1972	10,675
1973	12,861
1974	14,583
1975	16,290
1976	17,735

Drug cases seem to be declining from 24,000 in 1971.

The advent of “No Fault” did much to reduce the number of civil cases entered in the district courts. The fact that only 8.5% of the civil cases are tried is a normal indicator of the system.

¹In many cases more than one complaint is issued as the result of one incident. There are many variables in these figures but we still seek trends and significant indicators.

²Superior Court figures show 17,782 cases but these include Boston Municipal Court, etc.

Only 105 of the decisions of the District Court judges are appealed in civil cases to the appellate division.

Criminal Business

The indicators show that the criminal business of the District Courts has increased by 79,201 cases since 1975.

Appeals To Superior Court

It is of vital interest to find the true percentage of appeals in criminal cases from the district court to the Superior Court for a trial de novo or other disposition. The number of appeals is as follows:

<u>YEAR</u>	<u>NUMBER of Cases</u>
1955	4,057
1971	15,966
1972	17,342
1973	15,867
1974	14,999
1975	16,487
1976	15,660

Less Than 8% Appealed

About 7.2% of the 217,999 “Judge handled”³ criminal cases entered in the District Courts seem to have been appealed to the Superior Court. In such appeals (15,660) a jury trial was claimed or the sentence was challenged. As there were only 1,425 de novo criminal trials in the Superior Court during this period, it may safely be assumed that the purpose of most of such appeals may not actually be to have a trial by jury but to get the defendants a better disposition.

It may also be noted that auto violations account for 68.64% of the total criminal business of the District Courts. The General Court may wish to explore this fact of our jurisprudence.

Caseflow Management

In the Report of the Select Committee, paragraphs 45 to 54 (pps. 54-61) deal with various phases of caseflow management.

Unfortunately the real issue is not met.

Our present method of managing the progress of cases in the courts is based on a master calendar. Cases are filed by attorneys and in many the discovery of facts is undertaken with or without the necessity for

³Large volumes of motor vehicle non-parking complaints are handled by the clerk and the fine is paid by mail. The total number of criminal entries was 692,954.

any orders by the court. If a motion is filed it is also assigned to a master motion list for disposition at a session of court where such things are considered on a daily basis.

At such time as discovery is complete and other preliminaries have been settled, a case may be handled in a variety of ways. Methods include:

1. Assignment to a conciliator or mediator to see if a settlement can be reached.
2. Assignment to a pre-trial session where the judge would (a) see if a settlement is possible, and, if not, (b) reduce the issues for trial as much as possible.
3. Assignment with or without steps (1) and (2) to an auditor or master, to hear the evidence and make a report of his findings to the court.
4. Call of a trial list of those cases which appear to be ready for trial, to see if this is true.
5. Assignment of cases to trial sessions.

In late 1976 a rule was adopted by the Superior Court by which counsel could file a statement that the case was ready for trial. Presumably this certificate, particularly if both counsel agree, would speed the case to a trial session ahead of those which may or may not be truly awaiting a judge or a jury. Many cases are in the latter category.

The Individual Calendar

In the Federal Court of the District of Massachusetts and elsewhere, the system is one where a case is assigned to a judge who sees it through to the end. This is not the procedure in Massachusetts state courts.

In the individual calendar system all motions, pre-trial conferences and all other preliminary proceedings are heard before the judge who ultimately tries the case.

Other Systems

There are other calendaring systems which have been used including one where a single judge will handle the case and all pre-trial motions conferences and attempts at settlement, and then refer it to a master calendar for trial. In still another system, the case is referred to one judge for all pre-trial matters and then reviewed by a member of the court staff to see if it is ready for trial.

The Massachusetts System

In the Superior Court the first system of the master calendar is used. This is the system which is now being closely examined for improvements.

In the Report of the Select Committee it is stated in paragraph 45 that the elements of much better methods for the management and expediting of caseload are available and are set forth in the Report. That such methods are available we have no doubt. However, they are not well explained in the Report nor is there apparently any specific position taken by the Select Committee as to what kind of caseload management plan would be best for Massachusetts.

With the current insufficient number of Superior Court judges, it is questionable that any system of caseload management will work properly.

Because the justices of the Superior Court travel the circuit, from county to county, the individual calendar method is not as useful as it is where the judge remains in one county or in one location.

If we use the master calendar, we need the personnel and methods to see that it works properly.

The new rule on "Certificates of Readiness for Trial" may prove useful.

The suggestion that the Clerk prepare "daily pre-trial conference and trial lists" from the list which is ready for trial is neither novel nor magical. In the past the certificate of readiness was often delivered in person at the assignment sessions or at the call of the list. Daily pre-trial conferences were indeed called giving the date and time of such conferences.

When these procedures were attempted in the past they did not really solve the problem; but they were better than nothing.

In actual practice the clerks do try to arrange things so that attorneys and parties in cases known to be ready for trial are alerted and advised that the case will soon be heard.

We would recommend that all these practices be exploited; and that if a judge is available, that there be pre-trial conferences in cases where such conferences are likely to have any reasonable likelihood of success. It is one thing to have a conference, it is quite another to get the parties to agree to a settlement.

Certificates of Readiness for Trial

Item No. 46 of the Report of the Select Committee suggests that a rule be adopted in the Superior Court that any party may file a "certificate of readiness for trial."

Such a rule was adopted before the Report of the Select Committee was filed and reads as follows:

RULE: 35

TRIAL LISTS WITH JURY

(Applicable to civil jury actions)

There shall be a monthly jury trial list for each sitting of the court.

The list shall be composed of cases placed thereon (1) by order of the court, (2) by filing a Certificate of Readiness, (3) in their numerical order, or (4) in any combination of the foregoing. Said list need not be prepared for distribution except to such extent as may be deemed proper by the clerk or ordered by the court.

There shall be an Advanced Section on each trial list composed of (1) cases placed thereon by order of the court, and (2) cases in which a Certificate of Readiness has been filed. Except in cases where the Certificate of Readiness is signed by all parties interested, no case in which a Certificate of Readiness has been filed shall be placed on the Advanced Section until fourteen days have elapsed from such filing.

Not sooner than six months after the commencement of the action, a Certificate of Readiness may be filed by any party and joined in by any other party interested. If any parties interested have not joined in the Certificate of Readiness, the Certificate shall be served forthwith by the parties filing the Certificate on all other parties interested.

The Certificate of Readiness shall be in substantially the following form:

“The undersigned party or parties to this action request that the action be placed on the Advanced Section of the jury trial list for the week of _____, 197 , and hereby certify as follows:

1. All pleadings and discovery have been completed.
2. No pretrial motions are pending.
3. I/We intend an actual jury trial and agree to be ready therefor when reached on the first trial day of the week designated above and continuously thereafter until reached for trial.

DATED _____, 197

_____ Attorney for _____.

_____ Attorney for _____.

Within ten days after the filing of a Certificate of Readiness, any other party interested may move that the action shall not be placed on the Advanced Section of the jury trial list. Any such motion shall be accompanied by a certificate specifying the particulars in which the action is not ready for trial, and shall be marked for prompt hearing by the moving party.

Short lists shall be made by the clerk under the direction of the justice having direction of the lists and shall be mailed to all

counsel of record in the cases thereon; but failure to receive such list shall not be a sufficient excuse for ignorance that a case appears thereon.

The lists, assignments of cases, and other administrative matters in civil jury actions shall be subject to the direction of the justice having direction of the lists, except when a different justice is assigned by the chief justice.

Except in Suffolk, when separate sessions for or including civil jury business are held simultaneously in the same shire town, the list, assignment of cases and other administrative matters shall be subject to the direction of the justice sitting in the first session, except when a different justice is assigned by the chief justice.

This Rule was adopted on September 15, 1976.

2. The Use of Masters, Auditors and Magistrates

Masters and Auditors

There may be some confusion as to the function of Masters, Auditors and Magistrates.

The “Master” is an officer appointed by the court to hear the parties and their evidence and to make a report of facts to the judge. The Master is a one man committee rather than a judicial officer and the significance of this must be understood. Under the procedure existing prior to the adoption of the Massachusetts Rules of Civil Procedure, the Master’s findings of fact were *final*. Objections to his report could be made and filed but it was the obligation of the Master, in most cases, to produce a factual statement to which the judge could apply legal principles and make an ultimate decision.

The “Auditor”, under the pre-1974 procedure, was also an officer of the court whose function was fact-finding. Unless the parties were in agreement, however, the facts found by the Auditor were not final and binding. Although his ultimate finding was *prima facie* evidence, the litigants could produce additional evidence before a judge or jury.

Under Rule 53 of the Massachusetts Rules of Civil Procedure the court can now appoint a Master or Auditor to hear the evidence and make a report. If the case is one within the Equity jurisdiction of the court, or if the parties agree, the findings of fact of the Master/Auditor are final. If the case is a non-Equity case, or if the parties do not consent (which is seldom), the findings of fact are not final, although they carry great weight and constitute a *prima facie* case before a judge or jury.

Appointment and Compensation

The Master/Auditor is appointed by a judge. Such appointments can be on an *ad hoc* basis or from a list of Masters/Auditors which is

maintained from time to time by the court. The officer must be an attorney, by reason of the necessity that he have professional training in the law, and for the further reason that unless the Master/Auditor is an attorney, the parties and their counsel would utterly lack confidence in the individual or the proceedings before him. In cases where retired judges have sat as Master/Auditors the results have been favorable. Good results have also been obtained in the work of other persons skilled in this fact-finding art. The compensation of the Master/Auditor is at the rate of \$30.00 per hour for the hearing and \$30.00 per hour for time writing and deciding on the report.

There is a specific provision in Rule 53 permitting the court to order the parties to pay the cost of the Master/Auditor. Although it is usual for the county to meet this cost, the court could order the parties to pay. A litigant who already pays his share of the astronomical costs of the judicial system will not be likely to be enthusiastic about paying the Master/Auditor.

Position of the Judicial Council

Both the Judicial Council and the Supreme Judicial Court have discouraged the wide use of Masters and Auditors. There is an attraction to the efficiency expert if the case can be disposed of at a lesser cost, by reference to the Master/Auditor. This does happen but on balance it seems that there is no real saving in the time and resources of the court by the use of Masters and Auditors since they have no power to make a final disposition in the case. They should be used sparingly. In no sense is a Master/Auditor a substitute for a judge. To the extent that the Master/Auditor is also a practicing lawyer, we have the same objection that we voiced for years as to the Special Justices of the District Courts. We cite the following as an example of the time frame for dispositions of cases involving Masters/Auditors.

The case of *Jones v. Town of Wayland* was decided by the Appeals Court on December 28, 1976 after a trial in the Middlesex County Superior Court which followed a Master's hearing and report filed before July 1, 1974. It involved a cause of action which seems to have become contested in 1971 as the result of an incident in 1970. The case was sent back to the Superior Court for another trial in 1977 for a further judgment on the question of certain liability. We could recite many similar proceedings which involved a Master/Auditor which did not get speedy dispositions. This one is still pending in court seven years after the event which gave rise to the litigation.

Opinion on Constitutionality

After the filing of House No. 4400, based on the Report of the Select Committee on Judicial Needs, the Senate noted that House No. 4400 would substantially reorganize the structure, management and financing of the judicial system of the Commonwealth. The Senate further noted that certain doubt existed as to the constitutionality of certain portions of House No. 4400. An order was adopted requesting an opinion of the justices of the Supreme Judicial Court on seven questions arising out of proposals for vesting administrative authority in the Chief Justice of the Supreme Judicial Court, in the merger or consolidation of other courts, and in the appointment of a court administrator. The questions were as follows:

1. Does section 2A of chapter 211 of the General Laws, as appearing in section 781 of said bill, violate part 1, article 29 of the Constitution by vesting in the chief justice of the supreme judicial court those powers which part 1, article 29, vests in the supreme judicial court as a whole?
2. Does the second paragraph of section 2A of chapter 211 of the General Laws, as appearing in section 781 of said bill, which intends to empower the chief justice of the supreme judicial court to revise or abolish such divisions of the superior or district court as he deems the sound administration of justice requires constitute an invasion of the legislative power in violation of part 1, article 30 of the Constitution?
3. Do the fourth and fifth paragraphs of section 2A of chapter 211 of the General Laws, as appearing in section 781 of said bill, which intends to empower the chief justice of the supreme judicial court to transfer and authorize the transfer of any cases or matters from the superior court of one county to an adjoining county or of any cases or matters from one division of the district court to another division of the district court contravene the provisions and intent of Article 13 of the Declaration of Rights of the Constitution as to venue of criminal prosecutions?
4. Does section 3A of chapter 211 of the General Laws, as appearing in section 783 of the said bill, which intends to give to the chief justice of the supreme judicial court the exclusive right to appoint an administrator of courts, violate part 1, article 29 of the Constitution by vesting in the chief justice those powers which part 1, article 29, vests in the supreme judicial court as a whole?
5. Do the provisions of the first paragraph of section 1369 of said bill, which provides that the judge of the land court, the chief judge of probate and the judges of the housing courts shall be transferred to the superior court into which said courts are merged pursuant to said paragraph and become associate justices of the superior court, constitute demotions as to each of

said judges in violation of part 2, chapter 3, article 1 of the Constitution?

6. Does the fifth paragraph of section 1368 of said bill which provides that all justices and special justices of the municipal courts, including the municipal court of the city of Boston, existing district courts and juvenile courts shall become justices and special justices of the district court created by section 892 of said bill, and the first paragraph of section 1369 of said bill which provides that the judge and the associate judges of the land court, the chief judge, judges and special judges of probate and insolvency and judges of the housing court shall become associate judges of the superior court violate the constitutional powers of the executive department to appoint and commission judges and violate the tenure of their commissions guaranteed by part 2, chapter 3, article 1 of the Constitution?
7. Does the power and authority of the General Court to modify, enlarge, diminish, transfer and abolish the jurisdiction of all courts subordinate to the supreme judicial court extend to the merger of the probate court that is intended by the provisions of the first paragraph of section 1369 of said bill, whereby the said probate court, the housing courts, land court and courts of insolvency are to be merged with and into the superior court, despite the specific references to the probate court and probate judges contained in the Constitution, and more specifically in part 2, chapter 3, article 4 thereof?

**Summary of *Opinion of the Justices*
Regarding the Constitutionality of Certain Provisions of
House Bill 4400**

In the *Opinion of the Justices* on May 31, 1977, the Supreme Judicial Court determined that none of these provisions of House bill 4400 that were inquired into by the Senate were in conflict with the Constitution.

Questions number 1 and 4 asked whether certain provisions of the bill violated the Constitution “by vesting in the Chief Justice of the Supreme Judicial Court those powers which Part 1, Article 29 vested in the Supreme Judicial Court as a whole.” In question number 1 these powers under scrutiny include the power to prepare and submit a budget for the entire judicial system; to establish, revise or abolish divisions of the Superior and District Courts; to transfer cases of the Superior Court from one county to another and to transfer District Court cases from one division to another division; and to establish judicial regions.

Question number 4 concerned the constitutionality of authorizing and requiring the Chief Justice to appoint a court administrator.

In concluding that these two concepts were constitutional, the court reasoned that the administrative powers which House bill 4400 would confer upon any state official under its constitutional authority “to erect and constitute judicatories and courts of record, or other courts.” and constitute judicatories and courts of record, or other courts.” However, the court carefully noted that the Legislature could not grant the Chief Justice all powers associated with the administration of justice since certain inherent powers of judicial administration rest in the full court. The court cautioned that any attempt by the Legislature to grant the Chief Justice powers which are inherent in the court as a whole would be “ineffective” since such powers are created by the Constitution and cannot be divested by the Legislature. In addition, legislation which purports to give the Chief Justice the power to appoint a court administrator who would exercise the inherent powers, would likewise be ineffective.

Although the court pointed out that a distinction in the powers of judicial administration exists, it made no attempt to delineate or clarify what it might consider to be an “inherent” power. Instead, the court merely stated:

We have no reason to assume that a Chief Justice of the Supreme Judicial Court. . . would not perform his duties and exercise his authority within constitutional limits or that he would improperly attempt to exercise powers reserved to the full court.

Question number 2 considered whether an Act empowering the Chief Justice to revise or abolish divisions of the Superior or District Courts would be an unconstitutional exercise of the power of the Legislature. The Supreme Judicial Court recognized that such an action might appear to infringe upon the Legislature's power. The court reasoned, however, that it would be constitutional because: the decisions involved are so fundamentally related to the ongoing operation of existing statutory courts as to be appropriately within the realm of judicial authority and thus properly subject to a legislative decision to repose power therefore in a judicial officer.

The third inquiry was whether an Act empowering the Chief Justice of the Supreme Judicial Court to transfer Superior Court criminal cases from one county to another and District Court criminal cases from one division to another would violate the venue provision of Article 13 of the Declaration of Rights. The Supreme Judicial Court concluded that because the purpose behind the proposed provisions was to help alleviate the great backlog and resulting delay in the courts, such legislation would involve matters of great public concern and would enhance the swift administration of justice. Thus, to vest such transfer powers in the Chief Justice would not contravene article 13.

Section 1369 of House bill 4400 provides for the Chief Justice of the Probate Court, the judge of the Land court, and the justices of the Housing Court to become associate justices of the Superior Court. The fifth question asks whether this transfer of judicial personnel would result in a demotion of these judges in violation of the constitutionally guaranteed tenure of their commissions. In holding such a transfer constitutional, the court recognized the power of the Legislature to transfer the powers and duties vested in a judicial office it created. Even more significantly, however, the court stated that the:

[t]ransfer of judges to positions of expanded jurisdiction and reduced administrative responsibility, coupled with an increase in compensation for most of them, cannot be viewed as a demotion in violation of the judicial tenure provision of the Constitution.

Question number 6 is a two part question, the second part of which considers whether the transfer of any judges who must be reassigned consequent to the proposed unification of the judicial system violates their tenure rights. In concluding that any such transfer would be constitutional, the court followed the reasoning of its answer to question number 5. It did, however, elaborate somewhat by noting that while the tenure right protects judges from arbitrary dismissal, the Legislature has broad power to restructure the court system in an effort to achieve more efficient judicial administration.

In response to the first part of question number 6, the court simply ruled that the transfer of all the various judges pursuant to House bill 4400 would not be an unconstitutional infringement upon the authority of the Governor and Council to appoint judges.

The Supreme Judicial Court resolved question number 7 by concluding that the merger of the Probate Court into the Superior Court was within the power of the Legislature notwithstanding the specific reference to the Probate Court in the Constitution. In so ruling, the court adhered to precedents that determined the Supreme Judicial Court to be the only court established by the Constitution. The Probate Court is thus the creation of the Legislature; the constitutional reference is merely to insure public access to probate proceedings and not to establish a specific set of judges.

II. JUVENILE PROCEDURE AND PRACTICE

- A. Children in Need of Care and Protection - Revision of Procedures
- B. Disposition of Care and Protection Hearings
- C. Emergency Court Orders
- D. Evidentiary Procedures

A. CHILDREN IN NEED OF CARE AND PROTECTION REVISION OF PROCEDURES

SENATE (1976) No. 610

AN ACT REVISING THE DEFINITIONS AND PROCEDURES APPLICABLE TO CHILDREN IN NEED OF CARE AND PROTECTION.

Be it enacted by the Senate and House of Representatives in General Court assembled and by the authority of the same, as follows:

- 1 SECTION 1. Section 21 of chapter 119 of the General
- 2 Laws, as most recently amended by section 1A of chapter
- 3 1076 of the Acts of 1973, is hereby further amended by
- 4 inserting the following three definitions after the definition
- 5 of "Parent."
- 6 "Parent substitute" means any guardian, custodian or
- 7 other person not a parent who is responsible for the care of a
- 8 child.
- 9 "Respondent" means any parent or parent substitute
- 10 responsible for the care of a child alleged to be in need of
- 11 care and protection.
- 12 "Child in need of care and protection" means any child
- 13 under the age of 18 years
- 14 (i) who is suffering from inflicted physical injury or who is
- 15 suffering from emotional injury which endangers the life or
- 16 seriously endangers the physical or mental health of said
- 17 child, and whose parent or parent substitute is unwilling,
- 18 incompetent or unavailable to provide for said child's care
- 19 and protection or,
- 20 (ii) whose physical or mental condition has been substan-
- 21 tially impaired or is in imminent danger of being substan-
- 22 tially impaired because of inadequate food, clothing, shelter,
- 23 medical care or supervision within the resources of the par-
- 24 ent or parent substitute to provide, and whose parent or
- 25 parent substitute is unwilling, incompetent, or unavailable
- 26 to provide for said child's care and protection or,

27 (iii) who because of the disappearance or prolonged
28 absence of his parent or parent substitute and the failure of
29 the parent or parent substitute to secure alternative care is
30 without adequate food, clothing, shelter, and medical care.

1 SECTION 2. Said section 21 is hereby further amended
2 by striking the word “control” in clause (2) of the definition
3 of “Custody” and inserting in place thereof the word
4 “regulate.”

1 SECTION 3. Section 24 of chapter 119 of the General
2 Laws is hereby amended by striking out paragraph 1 of
3 Section 24 and inserting in its place the following.

4 A. Procedures For Care And Protection Proceedings.

5 The Boston juvenile court, the Worcester juvenile court,
6 the Bristol County juvenile court, the Springfield juvenile
7 court, the juvenile sessions of any district court of the Com-
8 monwealth which has juvenile sessions, and the probate
9 court shall have jurisdiction over care and protection pro-
10 ceedings. Such proceedings may be initiated upon the peti-
11 tion of the Department or any person or agency having
12 personal knowledge of the condition of a child or who has
13 been informed of the condition of the child, alleging on
14 behalf of a child under the age of eighteen years, and within
15 the jurisdiction of said court that said child is in need of care
16 and protection.

17 The petitioner shall not be required to initiate criminal
18 negligence proceedings against the parents or guardian of
19 the child alleged to be in need of care and protection.

20 After the petition has been filed the court shall issue a
21 precept to bring such child before said court, shall issue a
22 written notice to the Department if the Department is not
23 the petitioner, and shall issue a summons to the respondent
24 and to each parent of the child (if the parents are not the
25 respondent) with a copy of the petition attached. A summons
26 shall also be issued to the child’s parent substitute and to the
27 child’s lawful guardian, if any, known to reside within the
28 Commonwealth and if a parent, parent substitute or guard-
29 ian cannot be found to the person with whom such child last
30 resided, if known. Upon the issuance of a precept and order
31 of notice the court shall appoint a person qualified to make a
32 report to the court under oath of an investigation into the
33 conditions affecting the child. Upon the issuance of the pre-
34 cept and order of notice the court shall appoint counsel to
35 represent the interests of the child.

Under the existing provisions of Chapter 119, Section 1, it is the policy of the Commonwealth to strengthen and encourage family life

for the protection and care of children. When this is no longer realistic, it is the policy of the Commonwealth to provide substitute care and protection to insure the rights of any child to sound health and normal physical, mental, spiritual and moral development.

There is an attempt to define, for the purposes of the law, those children who are in need of care and protection. Under the existing law, Chapter 119, Section 24, the definition applies to any child under the age of eighteen who is: —

without necessary and proper physical, educational or moral care and discipline, or is growing up under conditions or circumstances damaging to a child's sound character development or who lacks proper attention of a parent, guardian with care and custody, or custodian, and whose parents or guardians are unwilling, incompetent or unavailable to provide such care. . . .

A child in the category embraced by this definition can be brought before one of our Juvenile Courts, or the juvenile session of one of our District Courts on a petition to show cause why such child should not be committed to the custody of the Department of Public Welfare.

If there is a finding that such child is proved to be in need of care and protection as above defined, there may be a commitment until the child is eighteen, or until the object of the commitment has been accomplished. The court may make orders which are conducive to the best interests of the child. The court has the right to make certain orders including:

1. The child may continue to live with the parents subject to conditions and limitations.
2. Temporary legal custody of the child, subject to certain limitations may be given to:
 - (a) an individual
 - (b) a public or private child care agency
 - (c) the Department of Public Welfare
3. The court may also order appropriate physical care including mental or dental care; and in appropriate cases the court shall order the parents to reimburse the Commonwealth or an agency for any care provided.

Change in the Definition

The principal thrust of Sentate No. 610 is to re-define "child in need of care and protection" and to more plainly set forth this definition in section 21 of Chapter 119 where other terms are defined in this area of the protection and care statute.

While the language of the present law is general in nature, it would be wise to adopt the new definition in Senate No. 610 as this new

definition would make it clear that in addition to that which is covered by the present definition, the court can aid children:

1. suffering from inflicted physical injury, or
2. suffering from emotional injury which endangers life or seriously endangers physical or mental health;
3. whose physical or mental condition is or might be substantially impaired because of inadequate food, clothing, shelter, medical care, or supervision within the means or resources of the parent to provide;
4. whose parents have disappeared or by their prolonged absence have left a child without adequate food, clothing, shelter or medical care.

Recommended Amendment to Senate No. 610

We would recommend that Section 1 of Senate No. 610 be amended by adding the following additional definition now appearing in Chapter 119, Section 24:

- 29 (iv) who is without necessary and proper physical, educa-
30 tional or moral care and discipline, or is growing up under
31 conditions or circumstances damaging to his sound character
32 development or who lacks proper attention of parent, guard-
33 ian with care and custody, or custodian or whose parents or
34 guardians are unwilling, incompetent, or unavailable to
35 provide such care, discipline or guidance.

We think our amendment complements the new proposed definition and that without such an amendment, the statutory definition would be incomplete.

The Commonwealth pays heavily both in terms of money and in terms of human suffering because of child abuse and neglect. Parents who inflict physical injury on their children should face the loss of parental rights and the child should be brought before the court for a determination. In the case of the more subtle and even more deadly situation which involves emotional injuries to children, there must be a realization that the sooner this tragic situation can be dealt with, the better is the chance that the child may ultimately recover its emotional health. The alternative is grim. The number of children who become emotional cripples is astounding and the Commonwealth and its social agencies can often offer too little too late. If this new definition will enable the courts to deal with children in this classification at an early age, it will be a tremendous benefit and it may in the long run lessen, however modestly, the cost of institutional care, the cost to the victim of a violent crime, and the cost of wrecked human lives.

Section 2 of Senate No. 610 would change the definition of the word

“Custody” as used in Chapter 119, Section 21 so that the court would “*regulate*” visits to the child rather than “control” such visits. We approve this change.

Procedures for Care and Protection Proceedings

Section 3 of Senate No. 610 would strike out the existing procedure for Care and Protection proceedings (Chapter 119, Section 24) and provide a slightly altered procedure. The significant changes to be made by the proposed legislation are these:

1. The proceeding could be brought in Probate Court in addition to juvenile courts or sessions.
2. The procedure would apply up to age 18.
3. It would not be necessary for any criminal negligence complaint to be filed against a parent before the care and protection proceedings could be used.
4. The Department of Public Welfare would be notified in every case.
5. An attorney would be appointed to represent the interests of the child.

We ought to observe here that the purpose of this part of Chapter 119 of the General Laws is to protect the interests of the child without regard to the financial circumstances of the family in which it resides. There may be reason to believe that child neglect and abuse, both physical and emotional, does not respect economic stratifications of society. It may be that the problems are better hidden among the more affluent, but they nonetheless exist.

The proposed changes in the procedure are forward looking and we recommend them.

We recommend the enactment of Senate No. 610 with the amendment which we have suggested.

B. DISPOSITION OF CARE AND PROTECTION HEARINGS

SENATE (1976) No. 607

AN ACT PERTAINING TO THE DISPOSITION OF CARE AND PROTECTION PROCEEDINGS

Be it enacted by the Senate and House of Representatives In General Court assembled and by the authority of the same, as follows:

- 1 Section 26 of chapter 119 of the General Laws, as most
- 2 recently amended by section 3 of chapter 1076 of the Acts of

1973, is hereby further amended by inserting after the first paragraph the following: —

The petitioner shall have the burden of proceeding and of establishing through a preponderance of evidence that the child is in need of care and protection as defined by section twenty-one, and that the resources of the parent or parent substitute or the resources available to the parent or parent substitute are insufficient to provide for the protection of the child's life or health without the supervision of the court or the transfer of the child's custody from the parent or parent substitute.

The court may dismiss the petition upon the recommendation of the investigator that the petition is without merit. The court shall dismiss the petition at the conclusion of the hearing if the petitioner fails to establish by a preponderance of the evidence that the child is in need of care and protection.

If the court finds the allegations in the petition proved by a preponderance of the evidence, or if all parties consent to a finding that the child is in need of care and protection, the court shall adjudge said child in need of care and protection and shall make an appropriate order for the care and custody of the child. The court by such order may:

(1) Permit the child to remain in the care and custody of a parent or parent substitute under supervision of the court, and may concurrently request the department to develop and implement a service plan to assist the parent or parent substitute in providing adequate care and protection for the child.

(2) Transfer temporary legal custody to any of the following if the court finds that permitting the child to remain in the custody of the Respondent would create a substantial danger that the child would continue to be in need of care and protection:

(a) Any relative or other person known to the child or his family who is found by the court to be qualified to care for the child. The Department may develop and implement a service plan for the child and his family whenever a child is placed by the court in the custody of a relative or other person.

(b) Any private Agency licensed or approved in accordance with chapter 28A to care for the child. The Agency shall, as a condition of the order, indicate his willingness to accept custody of the child and to provide adequate services to the child and his parent or parent substitute. The Agency may permit the child to remain in the care of his parent or parent substitute while it retains legal custody and provides services to the child and his parent or parent substitute.

(c) The Department, provided that the Department

52 develop and implement a service plan to meet the needs of
53 the child, may permit the child to remain in the care of his
54 parent or parent substitute while it retains legal custody and
55 provides services to the child and his parent or parent
56 substitute.

57 (3) It may order appropriate physical care including
58 medical or dental care.

59 In appropriate cases the court shall order the parents or
60 parent substitute of said child to reimburse the Common-
61 wealth or other Agency for care.

62 If temporary custody of a child is transferred pursuant to
63 this section the Department, Agency or person having cus-
64 tody shall arrange within two weeks after entry of the order
65 transferring custody a reasonable schedule of visits between
66 the child and family, including parents and parent substitute
67 and siblings related to the child. Reasonable visits between
68 the family and the child shall be permitted unless the
69 Department, Agency or person to whom custody has been
70 transferred obtains an order from the court having jurisdic-
71 tion over the child restraining the family or individual
72 members thereof from visiting the child. Such order may be
73 granted only upon a showing that the child's health or life
74 will be endangered if the family or individual members
75 thereof are permitted to visit the child. Such order shall
76 expire within such time after entry as the court shall fix, not
77 exceeding six months. No such order may be granted before
78 the court notifies the parent or parent substitute and pro-
79 vides an opportunity for them to be heard. A court having
80 jurisdiction over the child may grant a temporary order
81 restraining visitation. Such order shall by its terms within
82 such time after entry as the court shall fix not to exceed
83 fifteen (15) days. Upon issuance of the temporary order
84 restraining visitation the courts shall notify the person
85 against whom the temporary order has been sought and shall
86 schedule a hearing before the expiration of the temporary
87 order.

88 An adjudication and order of disposition that a child is in
89 need of care and protection shall remain in effect for such
90 time as the court shall fix, not exceeding one year. Any such
91 order shall be reviewed by the court every three months if
92 any party so requests. Upon the expiration of such order, all
93 parties may consent to its extension for an additional period
94 not exceeding one year and shall so notify the court.

95 Upon the expiration of such order any child who has not
96 been returned to the care and custody of his parent or parent
97 substitute shall be so returned, unless the original Petitioner,
98 or the Department or the person or agency to whom custody
99 has been transferred seeks a further order for custody of the
120 child in accordance with the following procedures.

101 The original Petitioner, Department or person or agency
102 who seeks to retain custody of the child shall file a report
103 with the court having jurisdiction over the child setting forth
104 the reasons why custody should not be returned to the
105 Respondent. Said report shall include in addition to any
106 other relevant information:

107 (1) A detailed description of the child's present physical,
108 mental and emotional condition;

109 (2) Educational history of the child if applicable;

110 (3) A description of the child's current placement and the
111 child's adjustment to that placement;

112 (4) Description of any social, educational or psychological
113 services provided to the child;

114 (5) The plan proposed for the care and protection of the
115 child if custody is not returned to the Respondent.

116 Said report may include any relevant, factual information
117 concerning the Respondent. A copy of the report shall be
118 provided to Counsel for the child served in hand or by
119 certified mail, return receipt requested. The Respondent or
120 his Counsel or Counsel for the child shall have twenty-one
121 (21) days in which to file a reply to the report with the court.
122 A copy of said reply(s) shall be provided to all parties.

123 After a review of the report and reply(s) to the report if
124 any the court shall either:

125 (1) Disallow the request for continued custody of the child
126 and order that the child be returned to the Respondent; or

127 (2) The court may order that a hearing be held to deter-
128 mine if the return of the child to the care and custody of the
129 Respondent would create a substantial danger that the child
130 would again be in need of Care and Protection.

131 No hearing shall be held without giving at least seven
132 days notice to the Respondent or Respondent's Counsel, to
133 Counsel for the child and to the Department if not the
134 Petitioner.

135 If the court finds that the Petitioner, Department,
136 Agency or person seeking to retain custody of the child has
137 established by a preponderance of the evidence a need for
138 continuation of an order for Care and Protection of the
139 child, the court shall adjudge such child in need of further
140 Care and Protection and shall enter an appropriate order for
141 the Care and Protection of the child, subject again to the
142 provisions of this section.

143 Such further order may include an award of permanent
144 custody of the child to the Department if the Department
145 has developed an alternative permanent plan for the child.

146 On any award of permanent custody the Department,
147 parent, parent substitute or person having legal custody of or
148 Counsel for the child may petition the court for a review and
149 redetermination of the current needs of such child, not more

150 than once every six months.

151 Nothing in this section shall prevent the Department or
 152 any agency from commencing a proceeding independent of
 153 a petition for adoption in the probate court of any county in
 154 which said Department or agency maintains an office to
 155 dispense with the need for consent to the adoption of a child
 156 in the care and custody of said Department or agency in
 157 accordance with chapter two hundred ten section 3 of Mas-
 158 sachusetts General Laws.

The Full Hearing

When a petition is filed calling upon a parent or parent substitute to show cause why a child should not be committed to the Department of Public Welfare to assure the care and protection of that child, there is a necessity that the proceeding be held under circumstances which do not violate the constitutional principles of due process of law.

It has been said that "the best of intentions and the greatest zeal to care for neglected, dependent or delinquent children do not justify the violation of constitutional provisions as to due process that are involved in removing a child from the custody of its parents" *In re Godden*, 158 Neb. 246,252 (1954).

Under the present statute, Chapter 119, Section 26, it is provided:

If the court finds the allegations in the petition proved within the meaning of this chapter, it may adjudge that said child is in need of care and protection and may commit the child....

It is apparent that under this statute almost total discretion is vested in the judge.

The Judicial Council has made a study of the procedure for hearings in care and protection matters in the states of Massachusetts, Connecticut, Maine, New Hampshire, Vermont, Rhode Island, New York, New Jersey, the District of Columbia, Illinois, California, Pennsylvania, Ohio, Georgia, Iowa, and Oregon.

It would appear that Massachusetts has enacted legislation which provides, along with current rules and methods of practice, for a hearing which does not violate the right to due process of law. It is assumed in the case of Massachusetts that the parties: —

1. Have the right to present witnesses and cross-examine.
2. Do have a right to private counsel, although the right of the parents to court appointed counsel is now clear. There is a present statutory right to appoint *counsel* for the child. Under existing law this is not absolute.
3. Have the right of appeal to Superior Court.
4. Have the right to a full hearing on all issues.

In Massachusetts there are presently three areas in proceedings for care and protection which could be improved. (1) There should be a standard of proof as there is in most of the jurisdictions which were studied; (2) there should be a provision for a legal advisor for the child; (3) there should be a record made.

Burden of Proof Senate No. 607

The proposed legislation would provide that the petitioner shall have the burden of going forward and proving the case *through a preponderance of evidence*. In the jurisdictions studied the evidence test was mainly either the preponderance rule or by “clear and convincing” evidence. In a large number of states, there seems to be no specific statutory test. We can find no instance where it is required that the allegations be proved beyond a reasonable doubt.

In line 8 of Senate No. 607 it is provided that the petitioner must also prove by a preponderance of the evidence that the financial resources of the parents are insufficient to provide for the protection of the child’s life or health without the supervision of the court, or the transfer of the child’s custody from the parent or parent substitute.

We do not believe that lines 8-13 inclusive of the bill are desirable and we find them confusing. If the companion bill, Senate No. 610, with our amendment, is enacted, it will not be necessary to include these confusing lines in the final draft of Senate No. 607.

Requirement for a Case Record

It is consistent with good practice in social work, and in dealing with children who suffer from physical or emotional injuries, to have a case folder provided. The plan embraced by the provisions of Senate No. 607 for the creation of a case folder available to counsel for the parents and the child, and to the court, seems a vast improvement over the existing system and is recommended.

Custody

The court now is empowered to “control” custody in care and protection cases. It is proposed to change this concept to one where the court would “regulate custody” (Senate No. 610) but it will be found in Senate No. 607 lines 62-87 that there is a provision for reasonable visits to the child except where this would be harmful. The provisions of Senate No. 607 speak of “temporary custody” but we construe this to mean possible long term “temporary custody” and in that sense the language of the bill is inadequate.

Remedial Plan

Senate No. 607 is especially attractive in that it calls for a “service plan to meet the needs of the child.” Provision is also made for necessary physical, medical, and dental care.

Psychological Services

We would recommend that in line 58 there be added the words: “psychological, psychiatric” before the words “or dental”. It is very important in cases of this sort to have a psychological evaluation, and in fact the proposed report requires a “detailed description of the child’s present physical, mental, and emotional condition” as well it should.

It is impressive that the thrust of Senate No. 607 is that help be obtained in a formal proceeding, and in accordance with a detailed plan, for a child in need of care and protection. The principle in the case is not to place blame for neglect but to find a solution. We are also impressed that the court is given the authority to order the parents to reimburse the Commonwealth for any care furnished, in appropriate cases.

With the suggestions as noted, we recommend Senate No. 607.

C. EMERGENCY COURT ORDERS

SENATE (1976) No. 609

AN ACT AUTHORIZING EMERGENCY COURT ORDERS TRANSFERRING THE CUSTODY OF A CHILD

Be it enacted by the Senate and House of Representatives In General Court assembled and by the authority of the same, as follows:

- 1 SECTION 1. Section 24 of chapter 119 of the General
- 2 Laws is amended by inserting the letter A at the beginning of
- 3 the first paragraph of section 24.

- 1 SECTION 2. Section 24 of chapter 119 of the General
- 2 Laws is amended by adding the following paragraphs: —
- 3 B. *Procedure for Emergency Transfer of Custody.* The
- 4 court may issue an emergency order transferring custody of a
- 5 child from the custodian to the department or a licensed
- 6 child care agency or an appropriate person in accordance
- 7 with the following procedures: —

8 (1) The petitioner seeking the emergency order of custody
9 must present detailed facts of the condition of the child
10 under oath to the court, and the court must find that there is
11 reasonable cause to believe that the child is suffering from
12 serious abuse or serious neglect or is in imminent danger of
13 serious abuse or serious neglect and that removal of the child
14 is necessary to protect the child from serious abuse or serious
15 neglect.

16 (2) Upon the issuance of an Emergency Transfer of Custody
17 order the court shall issue written notice to the custodian
18 informing him or her of the emergency order, its terms,
19 its expiration date, the reasons for the emergency order, the
20 right to an attorney and the right to have an attorney
21 appointed if indigent, and shall set a date for a hearing
22 within seven days on the custody of said child pending a
23 hearing on the merits of the care and protection petition.
24 Said hearing shall be in accordance with the following
25 procedure:

26 (a) In this preliminary hearing, the petitioner shall have
27 the burden of proceeding and of establishing probable cause
28 that the child is suffering from serious abuse or serious
29 neglect and there is an immediate and substantial danger to
30 the child's life or health and that there are no reasonable
31 means by which the child's life or health can be protected
32 without removing the child from the custodian.

33 (i) If the petitioner sustains such burden, the court shall
34 enter a preliminary order transferring custody of the child
35 pending a hearing on the merits. Such order shall be in
36 writing and shall state the reasons for removal of the child.

37 (ii) If the petitioner does not proceed or fails to sustain
38 such burden, the court shall forthwith order that custody of
39 the child remain with or revert to the custodian.

40 (iii) If it appears that the custodian has not been given
41 proper notice and for that reason is not at the hearing,
42 further notice shall be sent. If it appears after such additional
43 period that after due diligence the custodian cannot be given
44 proper notice or fails to respond to such additional notice
45 the court shall require the petitioner to sustain its burden as
46 required in (a) above.

47 (b) The custodian of any child whose custody is transferred
48 in accordance with these procedures shall be entitled
49 to reasonable visitation rights unless the court finds that such
50 visitation would endanger the child's life or health.

51 (c) Court notice to the custodian may be served by hand
52 or by certified mail to addressee only, return receipt
53 requested.

54 (d) At the request of the custodian, the preliminary hearing
55 shall be conducted before a judge other than the one who

56 issued the temporary order, unless another judge is not
57 available.

58 (e) The court may, at the request of the custodian, con-
59 tinue the preliminary hearing and may continue the emer-
60 gency order for a corresponding period of time. Petitioner
61 may not request a continuance of such emergency order.

1 SECTION 3. Section 25 of chapter 119 of the General
2 Laws is hereby repealed.

1 SECTION 4. Section 23 of chapter 119 of the General
2 Laws is hereby amended by adding to subsection C thereof
3 the following sentence: — The procedures for hearings on
4 temporary and preliminary custody orders shall be governed
5 by section twenty-four.

1 SECTION 5. Section 5 of Chapter 201, as most recently
2 amended by chapter 161 of the Acts of 1961, of the General
3 Laws is hereby amended by adding the following sentence:
4 — Hearings on applications to transfer custody from the
5 child's parent or parent substitute to the department or to a
6 private child care agency shall be in accordance with the
7 procedures set forth in section twenty-four of chapter one
8 hundred nineteen.

Care and Protection Proceedings Emergency Transfers of Custody

The third legislative proposal in this series pertaining to the care and protection of children deals with cases where there is serious abuse or neglect or the child is in imminent danger of serious abuse or neglect.

There is no special provision for emergency transfers of custody under Massachusetts law, at this time. If such emergencies are encountered, they are dealt with under Chapter 119, Section 26, or in some other fashion. We have determined in the course of our survey of fifteen other states that the emergency situation is either (1) handled by a judge after a summary proceeding, (2) handled by the police department on a summary basis, pending hearing, or (3) there is no statutory plan.

Massachusetts would be well served by the specific procedure set forth in Senate No. 609. If this bill is enacted the repeal of Section 25 of Chapter 119 would be necessary, as provided in Section 3 of the Bill.

Sections 4 and 5 of Senate No. 609 would be required particularly in the event that Senate No. 610 and Senate No. 607 were enacted as part of this "package".

We recommend this bill.

D. EVIDENTIARY PROCEDURES

SENATE (1976) No. 608

AN ACT ESTABLISHING EVIDENTIARY PROCEDURES IN
CARE AND PROTECTION HEARINGS.

*Be it enacted by the Senate and House of Representatives In General
Court assembled and by the authority of the same, as follows:*

1 SECTION 1. Chapter 119 of the General Laws is hereby
2 amended by inserting after Section 24 the following Section
3 24A: —
4 24A. Evidence in care and protection proceedings shall
5 be such facts and written materials as are admissible in court
6 according to rules of the common law and the General Laws.
7 The investigator appointed to section twenty-four shall be a
8 person who is qualified as an expert according to the rules of
9 the common law or by statute, or is an agent of the depart-
10 ment or an approved or licensed child care agency substan-
11 tially engaged in the provision of protective services to
12 abused, neglected or abandoned children and their families,
13 and who has investigated the facts relating to the welfare of
14 a child pursuant to section twenty-four. Provided that no
15 person shall be appointed as an investigator if such person is
16 an agent or employee of the Petitioner or an agent or
17 employee of the temporary custodian of the child.
18 The investigative report shall be limited to an enumera-
19 tion of facts concerning the home situation of the child and
20 the child's mental and physical condition. This report shall
21 not include medical, psychological or psychiatric assess-
22 ments of the child unless the assessments are made by an
23 expert qualified to make the assessments.
24 All statements included in the investigator's report shall
25 be signed by the person making the statement. Any person
26 named in the report shall be subject to examination by any of
27 the parties. The investigator may be called as a witness by
28 any party for examination. A party may interrogate an inves-
29 tigator by leading questions. The scope of cross-examination
30 of the investigator shall not be restricted to facts elicited
31 upon direct examination. A list containing the full name,
32 title, if any, and address of each person whose statements
33 have been included in the report shall be appended to the
34 body of the report. Certified copies of all agency or medical
35 records referred to in the report shall be appended to the
36 body of the report. A copy of the report shall be provided to
37 the court and to counsel for all parties at least seven days
38 before the hearing.

- 1 SECTION 2. Section 21 of chapter 119 of the General
2 Laws is hereby amended by striking out the definition of
3 “evidence.”

Evidence in Care and Protection Hearings

There is criticism of the definition of “Evidence” which applies to care and protection hearings. The definition appears in Chapter 119, Section 21 and reads: —

Evidence shall be admissible according to the rules of the common law, and the General Laws and may include reports to the court by any person who has made an investigation of the facts relating to the welfare of the child and is qualified as an expert according to the rules of the common law or by statute or is an agent of the department or of an approved charitable corporation or agency substantially engaged in the foster care or protection of children. Such person may file with the court in a proceeding under said sections a report in full of all the facts obtained as a result of such investigation. The person reporting may be called as a witness by any party for examination as to the statements made in the report. Such examination shall be conducted as though it were on cross examination.

It might be well to refer to Rule 43 of the Massachusetts Rules of Civil Procedure.

Senate No. 608 proposed certain changes in Section 21 as follows:

1. The investigator could not be employed by the petitioner or be an agent or employee of the person with temporary custody.
2. The investigative report would be limited to a listing of facts, not opinions.
3. Medical, psychological or psychiatric assessments must be made by experts in those disciplines.
4. Not only could the investigator be cross-examined on the report, but all persons named therein could be called for cross-examination.
5. There would be certified copies of records included in the report which must be available at least seven days before trial.

We are of the opinion that all of these suggested changes are desirable and tend to insure that the hearing is conducted with a minimum of confusion and a maximum of due process. Any documentary evidence which is carefully prepared is bound to lessen the time required for a hearing and the requirements for cross-examination guarantee due process. We think that it is useful for the Commonwealth to adopt measures which will assure that care and protection proceedings are conducted fairly and in accordance with known procedures. The termination of parental rights is a delicate situation. The less conjecture at

such times, the better. While a judge cannot always be certain of his decision, the proceedings will be more free of speculation if this series of bills is enacted.

We do not believe that Section 2 of Senate No. 608 should be enacted. At present the definition of "Evidence" in Section 21 applies to "Children In Need of Services" (CHINS) cases and other proceedings. If it is a forward move to enact Senate No. 608, it might be better to have Chapter 119, Section 21 amended by striking out the existing section 21 and replacing it with Section 1 of Senate No. 608.

III. PROBATE

- A. Adoption: Right to Inspect the Record - Adopted Person
- B. Adoption: Death of Husband or Wife Petitioner
- C. Custody - The Uniform Child Custody Jurisdiction Act
- D. Joint Legal Custody
- E. Illegitimate Children - Custody and Support Decrees
- F. Illegitimate Children - General Policy

A. ADOPTION:
RIGHT TO INSPECT THE RECORD - ADOPTED PERSON

HOUSE (1976) No. 3452

AN ACT ALLOWING AN ADOPTED PERSON TO OBTAIN ANY
AND ALL INFORMATION ON SUCH ADOPTION UPON
REACHING THE AGE OF TWENTY-ONE.

*Be it enacted by the Senate and House of Representatives in General
Court assembled, and by the authority of the same, as follows:*

- 1 Notwithstanding the provisions of any general or special
- 2 law to the contrary, any adopted person shall, upon reaching
- 3 the age of twenty-one years, be allowed to obtain any and all
- 4 information concerning said adoption. No other person
- 5 except the said adopted person shall be allowed access to
- 6 such information.

The present Massachusetts law governing the inspection of adoption records, G.L. Ch. 210, §5C, states in pertinent part:

All petitions for adoptions, all reports submitted thereunder and all pleadings, papers or documents filed in connection therewith, docket entries in the permanent docket and record books shall not be available for inspection, unless a judge of probate of the county where such records are kept, for good cause shown, shall otherwise order.

Until 1972 certain people, among them adoptees and adoptive parents, were specifically exempt from the statutory requirement to obtain pre-inspection court approval. In 1972, the Legislature saw fit to bring the Massachusetts law on this issue into concert with the law of the vast majority of states by deleting this exemption. Now, even the parties most intimately concerned with adoption must obtain a court order authorizing them to examine the adoption records.

Recently there has been wide-spread agitation to relax the require-

ment in these statutes so as to allow adult adoptees an unfettered opportunity to view their own adoption records. House No. 3452 is designed to effect this goal in Massachusetts.

The present statute does not impose an absolute prohibition on the inspection of adoption records. It is within the discretion of the Probate Court judges to authorize an inspection of adoption records after evaluating the effect such an investigation would have on all the parties and interests concerned. The Judicial Council feels that the present procedure, which affords individual judicial attention to the circumstances of each case, better serves the various interests than would the blanket statutory authorization proposed by House No. 3452.

In recommending that this bill not be enacted by the General Court we are not closing our eyes to the impact of the present law on adoptees. However, the encouragement and facilitation of adoptions, which are of great importance to the state and its citizens, would not be advanced by this proposed legislation.

There is a recognizable element of sympathy which attaches to the claim of adoptees that they should be allowed to investigate their natural heritage through examination of adoption records. However, the interests of both the natural and the adoptive parents must also be considered in analyzing the value of these sealing statutes. In *People v. Doe*, 138 N.Y.S. 2d 307 (Erie County Ct. 1955), the court, in addressing the problem of the adoption of illegitimate children, described the purpose of an adoption record sealing statute with respect to the interests of the parties to an adoption.

[The Legislature] has assured the mother, who has given birth to a child born out of wedlock and finds that she cannot properly take care of the child, that instead of secreting the child or placing it with persons haphazardly, if she wishes to permit suitable, desirous and qualified persons to adopt the infant, her indiscretion will not be divulged. It further assures her that the interests of the child will be protected in that no one will ever know by means of the adoption proceeding that the child is illegitimate. It assures the foster parents that they may treat the child as their own in all respects and need not fear that the adoption records will be a means of hurting the child, which has become by this proceeding their child, or of harming themselves. It assures all persons connected with the adoption that the records will be and remain sealed and secret.

Id. at 309.

Adoptions are also of vital interest to the public. In order to insure that adoption decrees further the best interests of the child, a petition

for adoption necessitates a searching investigation into facts, which, if revealed, could cause embarrassment to the disclosing party. The Legislature, by mandating that the documents involved in an adoption be sealed, has afforded protection to induce persons interested in an adoption to proceed with it and to feel free to provide the court with all the necessary information.

We do not recommend this bill.

B. ADOPTION: DEATH OF HUSBAND OR WIFE PETITIONER
HOUSE (1976) No. 3858

**AN ACT RELATIVE TO THE STATUS OF A HUSBAND OR A
WIFE WHO PETITIONS FOR ADOPTION AND DIES
BEFORE IT IS ALLOWED.**

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Section 1 of chapter 210 of the General
2 Laws, as most recently amended by chapter 370 of the acts
3 of 1966, is hereby further amended by inserting after the
4 third sentence the following sentence: — If either such hus-
5 band or wife dies prior to the making of the decree of adop-
6 tion, the name of the deceased husband or wife shall remain
7 upon the petition, and upon adoption the child shall be
8 considered to be the child of both.

1 SECTION 2. The second paragraph of section 6 of chap-
2 ter 210 of the General Laws, as most recently amended by
3 section 1 of chapter 107 of the acts of 1955, is hereby further
4 amended by adding the following sentence: — If the peti-
5 tioners are husband and wife and if one of them dies prior to
6 the making of the decree of adoption, the decree upon adop-
7 tion, and the certificate issued pursuant to section 6A, shall
8 state that both such husband and wife are the adopting
9 parents and that the adopted child is the child of both.

The Judicial Council opposes the enactment of House No. 3858. This bill would serve to implement nunc pro tunc adoption decrees, and we renew the position we took in our 44th Report at 31 in opposition to such decrees.

We are sympathetic to the plight of persons in the situation which House No. 3858 attempts to remedy. Currently, if the adopting father

dies prior to the decree, only the mother's name will appear on the birth certificate much as if the child were born out of wedlock. Notwithstanding our recognition of this problem and our inability to offer a solution, we do not believe that giving nunc pro tunc effect to such adoption decrees is the proper method for resolving the difficulty.

Fundamentally, such a use of a nunc pro tunc power distorts the rationale of the power itself for it is not based on any accidental delay in putting into effect a previously rendered court judgment. As Chief Justice Rugg stated in *Perkins v. Perkins*, 225 Mass. 392, 396 (1917),

The function of a nunc pro tunc order in general is to put upon the record and to render efficacious some finding, direction or adjudication of the court made actually or inferentially at an earlier time, which by accident, mistake or oversight was not made a matter of record, or to validate some proceeding actually taken but by oversight or mistake not authorized, or to prevent a failure of justice resulting, directly or indirectly, from delay in court proceedings subsequent to a time when a judgment, order or decree ought to and would have been entered, save that the cause was pending under advisement.

By statute, G.L. Ch. 210, §5A, the filing of a petition for adoption of a child under the age of fourteen may not result in a decree until the child has resided for at least six months in the home of the petitioner. This six-month residency requirement is not an accidental delay of proceedings such as envisioned by Chief Justice Rugg as a basis for exercising nunc pro tunc power. It is, instead, a condition of the adoption itself and allows observation of the adoptive family environment in order to ensure the protection of the child's interests.

Furthermore, the impact of House No. 3858 is foreseeably broader than the scope of the problem which it appears to address. Since adoption decrees are in the nature of in rem proceedings, that will be conclusively binding against the whole world, the seemingly innocuous procedure proposed by House No. 3858 will have a significant effect on the rights and obligations under life insurance contracts or property arrangements which specify payments to the "child or children" of the decedent. All manner of benefits under state and federal statutes might also be affected by this procedure.

We repeat our earlier admonition that "this proposal is one which is contrary to the legal philosophy which underlies our judicial procedure under which in rem decrees speak as of the date of entry save in those cases where the system itself is at fault by reason of delay, mistake or oversight". 44th Report of the Judicial Council, at 33.

C. CUSTODY — THE UNIFORM CHILD CUSTODY JURISDICTION ACT

1968 ACT

Sec.

1. Purposes of Act; Construction of Provisions.
2. Definitions.
3. Jurisdiction.
4. Notice and Opportunity to be Heard.
5. Notice to Persons Outside this State; Submission to Jurisdiction.
6. Simultaneous Proceedings in Other States.
7. Inconvenient Forum.
8. Jurisdiction Declined by Reason of Conduct.
9. Information under Oath to be Submitted to the Court.
10. Additional Parties.
11. Appearance of Parties and the Child.
12. Binding Force and Res Judicata Effect of Custody Decree.
13. Recognition of Out-of-State Custody Decrees.
14. Modification of Custody Decree of Another State.
15. Filing and Enforcement of Custody Decree of Another State.
16. Registry of Out-of-State Custody Decrees and Proceedings.
17. Certified Copies of Custody Decree.
18. Taking Testimony in Another State.
19. Hearings and Studies in Another State; Orders to Appear.
20. Assistance to Courts of Other States.
21. Preservation of Documents for Use in Other States.
22. Request for Court Records of Another State.
23. International Application.
24. Priority.
25. Severability.
26. Short Title.
27. Repeal.
28. Time of Taking Effect.

Be it enacted:

§ 1. [Purposes of Act; Construction of Provisions]

(a) The general purposes of this Act are to:

(1) avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;

(2) promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;

(3) assure that litigation concerning the custody of a child take

place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;

(4) discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

(5) deter abductions and other unilateral removals of children undertaken to obtain custody awards;

(6) avoid re-litigation of custody decisions of other states in this state insofar as feasible;

(7) facilitate the enforcement of custody decrees of other states;

(8) promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and

(9) make uniform the law of those states which enact it.

(b) This Act shall be construed to promote the general purposes stated in this section.

§ 2. [Definitions]

As used in this Act:

(1) “contestant” means a person, including a parent, who claims a right to custody or visitation rights with respect to a child;

(2) “custody determination” means a court decision and court orders and instructions providing for the custody of a child, including visitation rights; it does not include a decision relating to child support or any other monetary obligation of any person;

(3) “custody proceeding” includes proceedings in which a custody determination is one of several issues, such as an action for divorce or separation, and includes child neglect and dependency proceedings;

(4) “decree” or “custody decree” means a custody determination contained in a judicial decree or order made in a custody proceeding, and includes an initial decree and a modification decree;

(5) “home state” means the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least 6 consecutive months, and in the case of a child less than 6 months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the 6-month or other period;

(6) “initial decree” means the first custody decree concerning a particular child;

(7) “modification decree” means a custody decree which modifies or replaces a prior decree, whether made by the court which rendered the prior decree or by another court;

(8) “physical custody” means actual possession and control of a child;

(9) “person acting as parent” means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody; and

(10) “state” means any state, territory, or possession of the United States, the Commonwealth of Puerto Rico, and the District of Columbia.

§ 3. [Jurisdiction]

(a) A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) this State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child’s home state within 6 months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

(2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child’s present or future care, protection, training, and personal relationships; or

(3) the child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to

protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected [or dependent]; or

(4) (i) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child and (ii) it is in the best interest of the child that this court assume jurisdiction.

(b) Except under paragraphs (3) and (4) of subsection (a), physical presence in this State of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this State to make a child custody determination.

(c) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

§ 4. [Notice and Opportunity to be Heard]

Before making a decree under this Act, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child. If any of these persons is outside this State, notice and opportunity to be heard shall be given pursuant to section 5.

§ 5. [Notice to Persons Outside this State; Submission to Jurisdiction]

(a) Notice required for the exercise of jurisdiction over a person outside this State shall be given in a manner reasonably calculated to give actual notice, and may be:

(1) by personal delivery outside this State in the manner prescribed for service of process within this State;

(2) in the manner prescribed by the law of the place in which the service is made for service of process in that place in an action of its courts of general jurisdiction;

(3) by any form of mail addressed to the person to be served and requesting a receipt; or

(4) as directed by the court [including publication, if other means of notification are ineffective].

(b) Notice under this section shall be served, mailed, or delivered, [or last published] at least [10, 20] days before any hearing in this State.

(c) Proof of service outside this State may be made by affidavit of the individual who made the service, or in the manner prescribed by the law of this State, the order pursuant to which the service is made, or the law of the place in which the service is made. If service is made by mail, proof may be a receipt signed by the addressee or other evidence of delivery to the addressee.

(d) Notice is not required if a person submits to the jurisdiction of the court.

§ 6. [Simultaneous Proceedings in Other States]

(a) A court of this State shall not exercise its jurisdiction under this Act if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this Act, unless the proceeding is stayed by the court of the other state because this State is a more appropriate forum or for other reasons.

(b) Before hearing the petition in a custody proceeding the court shall examine the pleadings and other information supplied by the parties under section 9 and shall consult the child custody registry established under section 16 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the state court administrator or other appropriate official of the other state.

(c) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with sections 19 through 22. If a court of this state has made a custody decree before being informed of a pending proceeding in a court of another state it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate forum.

§ 7. [Inconvenient Forum]

(a) A court which has jurisdiction under this Act to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

(b) A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child.

(c) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

- (1) if another state is or recently was the child's home state;
- (2) if another state has a closer connection with the child and his family or with the child and one or more of the contestants;
- (3) if substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;
- (4) if the parties have agreed on another forum which is no less appropriate; and
- (5) if the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in section 1.

(d) Before determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.

(e) If the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, it may dismiss the proceedings, or it may stay the proceedings upon condition that a custody proceeding be promptly commenced in another named state or upon any other conditions which may be just and proper, including the condition that a moving party stipulate his consent and submission to the jurisdiction of the other forum.

(f) The court may decline to exercise its jurisdiction under this Act if a custody determination is incidental to an action for divorce or another proceeding while retaining jurisdiction over the divorce or other proceeding.

(g) If it appears to the court that it is clearly an inappropriate forum it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings in this State, necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses. Payment is to be made to the clerk of the court for remittance to the proper party.

(h) Upon dismissal or stay of proceedings under this section the court shall inform the court found to be the more appropriate forum of this fact or, if the court which would have jurisdiction in the other state is not certainly known, shall transmit the information to the court administrator or other appropriate official for forwarding to the appropriate court.

(i) Any communication received from another state informing this State of a finding of inconvenient forum because a court of this State is the more appropriate forum shall be filed in the custody registry of the appropriate court. Upon assuming jurisdiction the court of this State shall inform the original court of this fact.

§ 8. [Jurisdiction Declined by Reason of Conduct]

(a) If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction if this is just and proper under the circumstances.

(b) Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

(c) In appropriate cases a court dismissing a petition under this section may charge the petitioner with necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses.

§ 9. [Information under Oath to be Submitted to the Court]

(a) Every party in a custody proceeding in his first pleading or in an affidavit attached to that pleading shall give information under oath as

to the child's present address, the places where the child has lived within the last 5 years, and the names and present addresses of the persons with whom the child has lived during that period. In this pleading or affidavit every party shall further declare under oath whether:

(1) he has participated (as a party, witness, or in any other capacity) in any other litigation concerning the custody of the same child in this or any other state;

(2) he has information of any custody proceeding concerning the child pending in a court of this or any other state; and

(3) he knows of any person not a party to the proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child.

(b) If the declaration as to any of the above items is in the affirmative the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and as to other matters pertinent to the court's jurisdiction and the disposition of the case.

(c) Each party has a continuing duty to inform the court of any custody proceeding concerning the child in this or any other state of which he obtained information during this proceeding.

§ 10. [Additional Parties]

If the court learns from information furnished by the parties pursuant to section 9 or from other sources that a person not a party to the custody proceeding has physical custody of the child or claims to have custody or visitation rights with respect to the child, it shall order that person to be joined as a party and to be duly notified of the pendency of the proceeding and of his joinder as a party. If the person joined as a party is outside this State he shall be served with process or otherwise notified in accordance with section 5.

§ 11. [Appearance of Parties and the Child]

[(a) The court may order any party to the proceeding who is in this State to appear personally before the court. If that party has physical custody of the child the court may order that he appear personally with the child.]

(b) If a party to the proceeding whose presence is desired by the court is outside this State with or without the child the court may order

that the notice given under section 5 include a statement directing that party to appear personally with or without the child and declaring that failure to appear may result in a decision adverse to that party.

(c) If a party to the proceeding who is outside this State is directed to appear under subsection (b) or desires to appear personally before the court with or without the child, the court may require another party to pay to the clerk of the court travel and other necessary expenses of the party so appearing and of the child if this is just and proper under the circumstances.

§ 12. [Binding Force and Res Judicata Effect of Custody Decree]

A custody decree rendered by a court of this State which had jurisdiction under section 3 binds all parties who have been served in this State or notified in accordance with section 5 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to these parties the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law, including the provisions of this Act.

§ 13. [Recognition of Out-of-State Custody Decrees]

The courts of this State shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this Act or which was made under factual circumstances meeting the jurisdictional standards of the Act, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this Act.

§ 14. [Modification of Custody Decree of Another State]

(a) If a court of another state has made a custody decree, a court of this State shall not modify that decree unless (1) it appears to the court of this State that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Act or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction.

(b) If a court of this State is authorized under subsection (a) and section 8 to modify a custody decree of another state it shall give due

consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with section 22.

§ 15. [Filing and Enforcement of Custody Decree of Another State]

(a) A certified copy of a custody decree of another state may be filed in the office of the clerk of any [District Court, Family Court] of this State. The clerk shall treat the decree in the same manner as a custody decree of the [District Court, Family Court] of this State. A custody decree so filed has the same effect and shall be enforced in like manner as a custody decree rendered by a court of this State.

(b) A person violating a custody decree of another state which makes it necessary to enforce the decree in this State may be required to pay necessary travel and other expenses, including attorneys' fees, incurred by the party entitled to the custody or his witnesses.

§ 16. [Registry of Out-of-State Custody Decrees and Proceedings]

The clerk of each [District Court, Family Court] shall maintain a registry in which he shall enter the following:

- (1) certified copies of custody decrees of other states received for filing;
- (2) communications as to the pendency of custody proceedings in other states;
- (3) communications concerning a finding of inconvenient forum by a court of another state; and
- (4) other communications or documents concerning custody proceedings in another state which may affect the jurisdiction of a court of this State or the disposition to be made by it in a custody proceeding.

§ 17. [Certified Copies of Custody Decree]

The Clerk of the [District Court, Family Court] of this State, at the request of the court of another state or at the request of any person who is affected by or has a legitimate interest in a custody decree, shall certify and forward a copy of the decree to that court or person.

§ 18. [Taking Testimony in Another State]

In addition to other procedural devices available to a party, any party to the proceeding or a guardian ad litem or other representative

of the child may adduce testimony of witnesses, including parties and the child, by deposition or otherwise, in another state. The court on its own motion may direct that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony shall be taken.

§ 19. [Hearings and Studies in Another State; Orders to Appear]

(a) A court of this State may request the appropriate court of another state to hold a hearing to adduce evidence, to order a party to produce or give evidence under other procedures of that state, or to have social studies made with respect to the custody of a child involved in proceedings pending in the court of this State; and to forward to the court of this State certified copies of the transcript of the record of the hearing, the evidence otherwise adduced, or any social studies prepared in compliance with the request. The cost of the services may be assessed against the parties or, if necessary, ordered paid by the [County, State].

(b) A court of this State may request the appropriate court of another state to order a party to custody proceedings pending in the court of this State to appear in the proceedings, and if that party has physical custody of the child, to appear with the child. The request may state that travel and other necessary expenses of the party and of the child whose appearance is desired will be assessed against another party or will otherwise be paid.

§ 20. [Assistance to Courts of Other States]

(a) Upon request of the court of another state the courts of this State which are competent to hear custody matters may order a person in this State to appear at a hearing to adduce evidence or to produce or give evidence under other procedures available in this State [or may order social studies to be made for use in a custody proceeding in another state]. A certified copy of the transcript of the record of the hearing or the evidence otherwise adduced [and any social studies prepared] shall be forwarded by the clerk of the court to the requesting court.

(b) A person within this State may voluntarily give his testimony or statement in this State for use in a custody proceeding outside this State.

(c) Upon request of the court of another state a competent court of this State may order a person in this State to appear alone or with the

child in a custody proceeding in another state. The court may condition compliance with the request upon assurance by the other state that state travel and other necessary expenses will be advanced or reimbursed.

§ 21. [Preservation of Documents for Use in Other States]

In any custody proceeding in this State the court shall preserve the pleadings, orders and decrees, any record that has been made of its hearings, social studies, and other pertinent documents until the child reaches [18, 21] years of age. Upon appropriate request of the court of another state the court shall forward to the other court certified copies of any or all of such documents.

§ 22. [Request for Court Records of Another State]

If a custody decree has been rendered in another state concerning a child involved in a custody proceeding pending in a court of this State, the court of this State upon taking jurisdiction of the case shall request of the court of the other state a certified copy of the transcript of any court record and other documents mentioned in section 21.

§ 23. [International Application]

The general policies of this Act extend to the international area. The provisions of this Act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.

§ 24 [Priority]

Upon the request of a party to a custody proceeding which raises a question of existence or exercise of jurisdiction under this Act the case shall be given calendar priority and handled expeditiously.

§ 25. [Severability]

If any provision of this Act or the application thereof to any person or circumstance is held invalid, its invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

§ 26. [Short Title]

This Act may be cited as the Uniform Child Custody Jurisdiction Act.

§ 27. [Repeal]

The following acts and parts of acts are repealed:

- (1)
- (2)
- (3)

§ 28. [Time of Taking Effect]

This Act shall take effect.

The Judicial Council recommends the enactment of the Uniform Child Custody Jurisdiction Act.

There is a growing public concern over the chaotic situation which results when a parent, dissatisfied by a child custody award made pursuant to a divorce or separation, abducts the child and moves to another state in search of a more favorable decree. If the parent is successful in having the original decree modified, not only is legal confusion created due to the conflicting decrees from courts of sister states, but, more importantly, the child is uprooted at a time when security and stability of environment are of a paramount importance. The Uniform Child Custody Jurisdiction Act is a statutory attempt to discourage the child snatching and forum shopping which lead to protracted interstate child custody disputes.

The United States Supreme Court has never settled the question of whether the full faith and credit clause of the Constitution applies to custody decrees.

So far as the Full Faith and Credit Clause is concerned, what [the original state] could do in modifying the decree, [the second state] may do. . . . [I]t is clear that the State of the forum has at least as much leeway to disregard the judgment, to clarify it, or depart from it as does the state where it was rendered.

New York *ex rel Halvey v. Halvey*, 330 U.S. 610, 614-15 (1947).

Thus, the original decree has no more force and effect in the second state than it would receive in the courts of the original state. *Jones v. Jones* 349 Mass. 259, 266, 207 N.E.2d 922, 927 (1965). Since most states allow modification of custody decrees by their own courts, a court of a

second state may, under the *Halvey* rationale, give recognition to the prior decree at the same time that it acts to modify it. *Aufiero v. Aufiero*, 332 Mass. 149, 123 N.E.2d 709 (1955).

The guiding principle in making or modifying custody awards is that the best interests of the child must be served. *Smith v. Smith*, 361 Mass. 855, 279 N.E.2d 693, 694 (1972). It is because of this assumption, courts emphasize, that custody awards must be fluid and freely modifiable so as to allow judicial reaction to a change of circumstances which dictates a change in the custody arrangements for the benefit of the child.

Because the child's welfare is the controlling guide in custody determination, a custody decree is of an essentially transitory nature. The passage of even a relatively short period of time may work great changes, although difficult of ascertainment, in the needs of a developing child. Subtle, almost imperceptible, changes in the fitness and adaptability of custodians to provide for such needs may develop with corresponding rapidity. A court that is called upon to determine to whom and under what circumstances custody of an infant will be granted, cannot, if it is to perform its function responsibly, be bound by a prior decree of another court. . . .

Kovacs v. Brewer, 356 U.S. 604, 612 (1958).

This modifiability, although recognizably beneficial in many instances, has served to generate the situation which we now seek to remedy.

If the court, to protect the best interest of the child, reopens the custody question, it encourages parents to violate existing decrees in order to gain access to a more favorable forum; in effect, the court rewards a form of child stealing. Yet if the court refuses to reopen the question, it risks rendering an order dissonant with the best interest of the child.

Ferreira v. Ferreira, 9 Cal. 3d 824, 512 P.2d 304, 109 Cal. Rpt. 80 (1973).

In this Commonwealth, jurisdiction in custody disputes may be based upon the presence of the child in the state and whether the child is an inhabitant or a resident. *See* G.L. Ch. 208, §§28, 29; *Jones v. Jones*, 349 Mass. 259, 265, 207 N.E.2d 922, 926 (1965); *Aufiero v. Aufiero*, 332 Mass. 149, 123 N.E.2d 709 (1955).

Most recently, in the Acts of 1976 Chapter 435, the Legislature has extended the scope of the so-called long-arm statute to reach, under certain circumstances, out-of-state defendants in cases of child custody disputes. The real test of the effectiveness of this enactment will depend not on the broader jurisdictional basis that it confers on the Massachusetts courts, but rather upon the recognition of that jurisdiction by courts of other states. Without a system for interstate judicial

cooperation in such matters, extension of jurisdiction will have little beneficial effect.

The Uniform Child Custody Jurisdiction Act is designed to encourage cooperation among the courts of enacting states and to establish a hierarchy of jurisdiction to obviate the jurisdictional conflicts which are now prevalent in interstate custody disputes. Pursuant to this Uniform Act, the court of one state will assume full and continuing responsibility for the custody of a particular child. The determination of the proper court to fulfill this role will depend upon which court has access, within its jurisdictional area, to the greatest amount of relevant information about the child and the family. Emphasis of this selection will be placed upon the home state of the child. Once the primary or “custody” court is determined, the courts of other states, when interstate proceedings develop, will assist it by gathering and sending information to the “custody court”.

Courts of other states will also abide by and enforce the decree of the “custody court”, and any modifications of that decree will be made by the “custody court”. If the child and his family should sever their ties with the state of the “custody court”, another state’s court will replace it as the court with the responsibility in the matter.

Although like other uniform acts, the Uniform Child Custody Jurisdiction Act will have its full impact only when it is enacted in many states, the Judicial Council is of the opinion that it is the most innovative and useful tool currently available for resolving interstate custody disputes.

D. JOINT LEGAL CUSTODY

HOUSE (1976) No. 1784

AN ACT AMENDING THE CHILD CUSTODY LAWS TO ALLOW
THE PROBATE COURT TO ENTER AN ORDER FOR JOINT
LEGAL CUSTODY

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

- 1 Section 31 of Chapter 208 of the General Laws is hereby
- 2 amended by adding at the end thereof the following: —
- 3 “Consistent with the best interests of the children as
- 4 determined by the Probate Court, the Court may order the
- 5 children to be in the joint legal custody of their parents and,

6 if such an order is entered, to direct that some or all of the
7 children shall principally reside with and be in the physical
8 custody of one or the other of the parents.”

HOUSE (1976) No. 306

AN ACT PROVIDING THE SHARING OF CUSTODY, VISITA-
TION AND SUPPORT OF CHILDREN.

*Be it enacted by the Senate and House of Representatives in General
Court assembled, and by the authority of the same, as follows:*

1 SECTION 31. In all divorces involving minor children,
2 both parents shall share temporary and final custody, visita-
3 tion and support, unless one or both parents are proven to be
4 grossly unfit to such an extent and in such a manner as to
5 cause immediate physical or emotional danger or damage to
6 the children, and unless one or both parents abandon the
7 child/children or voluntarily relinquish(es) shared custody.
8 The determination by both legal custodial parents of the
9 shared arrangements shall be binding, unless it can be
10 proven by clear and convincing evidence to the Court that
11 such arrangements are not in the best interest of the
12 child/children. The shared arrangements shall be deter-
13 mined by the Court when the parents fail to agree or when a
14 change in circumstances established by clear and convincing
15 evidence warrants a change of the shared arrangements.
16 Shared custody shall be defined as principal residence: when
17 the child/children are with the mother her domicile shall be
18 the principal residence and when the children are with the
19 father, his domicile shall be the principal residence. Visita-
20 tion shall alternate in accordance with the change in princi-
21 pal domicile.

Both House No. 1784 and House No. 306 propose to influence the Probate Court’s power in custody determinations. The polestar by which courts must be guided in making such determinations is the “best interests of the child.” *Smith v. Smith*, 361 Mass. 855 (1972).

Insofar as the court has broad discretion to protect the welfare of the child, we feel that House bill 1784 is merely declaratory of the court’s current power. Thus, we oppose its enactment as unnecessary.

House bill 306 proposes to alter G.L. Ch. 208, §31 which the Supreme Judicial Court has construed as follows:

The words of the governing statute... are broad in scope. They are not bounded by limiting restrictions. There is no express or

implied requirement that the parent must be found unequivocally to be unfit before the custody of the child can be awarded to some suitable third person. The trial court is vested with power to do what seems expedient in the light of all the conditions.... there may well be cases where the welfare of the child will be promoted by placing it in the custody of another and yet where the court cannot say that the parents are actually unfit.

Perry v. Perry, 278 Mass. 601, 604-05 (1932).

House No. 306 represents a subtle shift away from the “best interests of the child” doctrine as the guiding principle in custody determinations. It places increased emphasis on providing the parents with equal shares in the custody of the child and diminishes the consideration of whether such a sharing of custody would benefit the child. Only when a parent is shown by clear and convincing proof to be grossly unfit or to have voluntarily relinquished custody would this sharing arrangement be inappropriate. This new emphasis would abrogate the current philosophy underlying custody determinations.

It has been said that the first and paramount duty of courts is to consult the welfare of the child. To that governing principle every other public and private consideration must yield. Parents are the natural guardians of their minor child and entitled to its custody. But they have no absolute property right of which they can in no way be deprived without their consent. Their right will not be enforced to the detriment of the child.

Richards v. Forrest, 278 Mass. 547, 553 (1932).

We believe that this is the proper philosophy to be followed in custody determinations and therefore we oppose the enactment of House No. 306.

E. ILLEGITIMATE CHILDREN — CUSTODY AND SUPPORT DECREES

HOUSE (1976) No. 4168

AN ACT GRANTING PROBATE COURTS THE POWER TO MAKE DECREES CONCERNING THE CARE, CUSTODY, EDUCATION AND MAINTENANCE OF CERTAIN ILLEGITIMATE CHILDREN.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 Chapter 209 of the General Laws is hereby amended by

- 2 inserting after section 37 the following section: —
 3 SECTION 37A. The probate court for the county in
 4 which an illegitimate child resides, upon petition of the
 5 mother or father of said child, or of a next friend of said child,
 6 after notice to said mother and father, shall have the same
 7 power to make decrees relative to its care, custody, educa-
 8 tion and maintenance and to revise and alter such decree or
 9 make a new decree, as the superior court has relative to
 10 children whose parents are divorced. In the event the rela-
 11 tionship of father or mother is contested, such probate court
 12 shall have the power to hold a hearing on such contest and
 13 make a decision whether or not such relationship exists.

The Judicial Council is opposed to enactment of House No. 4168 which proposes to grant power to the Probate Courts to make decrees concerning the welfare of illegitimate children. We note that the Probate Courts already have broad power in this area.

G.L. ch. 201, §1 confers on the Probate Courts jurisdiction to appoint guardians for the protection of certain incompetents. This statute states in pertinent part:

The probate court may, if it appears necessary or convenient, appoint guardians of minors . . . who are inhabitants of or residents in the county . . .

The powers and obligations of such a custodian are given expression in G.L. ch. 201, §5:

The guardian of a minor shall have the custody of his person and the care of his education, except that the parents of the minor, jointly, or the surviving parent shall have such custody and said care unless the court otherwise orders. The probate court may, upon the written consent of the parents or surviving parent, order that the guardian shall have such custody; and may so order if, upon the hearing and after such notice to the parents or surviving parent as it may order, it finds such parents, jointly, or the surviving parent, unfit to have such custody; or if it finds one of them unfit therefor and the other files in court his or her written consent to such order.

Although the statutory language makes no distinction between legitimate and illegitimate minors, a predecessor statute has been construed as allowing the Probate Court jurisdiction over both classes. In *In re Chambers's case*, 221 Mass. 178 (1915), the Supreme Judicial Court discussed the power of a Probate Court to appoint a guardian for an illegitimate child, conferred by R.L. ch. 145, §1.

There is no limitation of jurisdiction, either by express terms or fair implication, in R.L. c. 145, §1, or c. 162, §3, to the appointment of guardians for children born in lawful wedlock. The words of the statute confer that jurisdiction in broad terms and include

all minor children whatever may be their status in other respects. In reason there is quite as much necessity for the appointment of guardians for illegitimate minors as of any others.

Id. at 179-80.

On the basis of the foregoing, we believe that the proposed statute is merely a declaration of the Probate Court’s current powers and, as such, is unnecessary.

F. ILLEGITIMATE CHILDREN — GENERAL POLICY

HOUSE (1976) No. 3436

AN ACT TO AMEND THE LAWS PERTAINING TO CERTAIN CHILDREN.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

- 1 Chapter 273 of the General Laws is hereby amended by
- 2 adding the following section: —
- 3 10A: Every child, whether or not born in wedlock, is the
- 4 legitimate child of its natural parents and is entitled to all
- 5 rights and privileges as if born in lawful wedlock. The term
- 6 “natural parents” shall mean the child’s mother and the
- 7 child’s father if (a) the father is or has been married to the
- 8 mother and child is born during marriage or within ten
- 9 months after divorce (b) the mother and father have been
- 10 married, though marriage has been declared void; (c) the
- 11 father acknowledges child in writing filed with and
- 12 approved by the probate court; (d) the father receives the
- 13 child into his family or lives with child or does other such
- 14 acts indicating paternity (e) the father and mother marry
- 15 after birth of child; (f) the father consented to artificial
- 16 insemination; (g) the father is adjudicated father of the child
- 17 by a court or by other competent jurisdiction.
- 18 Section 11 of chapter 273 of the General Laws is hereby
- 19 repealed and the following is inserted in place thereof: —
- 20 Section 11. A proceeding to determine the paternity of a
- 21 child shall be a civil proceeding and the district court shall
- 22 have jurisdiction of said proceeding. A proceeding to deter-
- 23 mine paternity may be brought in the district court sitting
- 24 for the county where the alleged father lives or in the county
- 25 where the mother lives. Paternity may be determined upon
- 26 the petition of the mother, the father, or any guardian of the
- 27 child. If a proceeding to determine paternity is commenced

during the pregnancy of the mother, the trial shall not, without the alleged father's consent, be held until after the birth, miscarriage, or stillbirth of the child, or until the mother is at least six months pregnant. The rules of evidence and competency of witnesses in said proceeding shall be as in any other civil proceeding and in the event an adjudication of paternity is made, the alleged father may appeal therefrom as from any other civil proceeding in the district court, provided, however, that the alleged father, if he so desires, may request a trial de novo before a jury on the superior court or district court, if jury sittings are available on said district court.

Section 12 of chapter 273 of the General Laws is hereby repealed.

Section 15 of chapter 273 of the General Laws is hereby repealed.

Section 16 of chapter 273 of the General Laws is hereby amended by striking the words, "or after conviction" and substituting in place thereof the words, "or after an adjudication of paternity" and by striking the words "original complaint or indictment" and substituting in place thereof "original cause of action", and by striking the words "penalties and".

Section 19 of chapter 273 of the General Laws is hereby repealed.

Section 7 of chapter 4 of the General Laws is hereby amended by striking the sixteenth clause thereof and inserting in place thereof the following: "Issue" — sixteenth, "Issue", as applied to the descent of estates, shall include all the lawful lineal descendants of the ancestor, including children born out of wedlock.

Section 7 of chapter 4 of the General Laws is hereby amended by adding between the fifth and sixth paragraphs thereof, the following words: "Children" — Fifth (A), "Children" shall include every child, whether born in or out of wedlock".

Section 1, subsection (3) of chapter 152 of the General Laws is hereby amended by adding after the words "members of the employee's family" the words "including children born out of wedlock".

Section 32, subsection (c) of chapter 152 of the General Laws is hereby amended by adding after the words "Upon the parent with whom they are living at the time of the death of such parent" the words "including their children born out of wedlock".

Section 32, subsection (d) of chapter 152 of the General Laws is hereby amended by adding after the words "any children of the deceased employee conceived but not born at the time of the employee's injury", the words "including the

77 natural children of the mother, and the natural children of
78 the father if (a) the father is or has been married to the
79 mother and the child is born during the marriage or within
80 ten months after divorce; (b) the mother and father have
81 been married, though the marriage has been declared void;
82 (c) the father has acknowledged the child in writing filed
83 with and approved by the probate court; (d) the father has
84 received the child into his family or lives with the child or
85 does other such acts indicating paternity; (e) the father con-
86 sented to artificial insemination; (f) the father is adjudicated
87 the father of the child by a court or other competent
88 jurisdiction.”

89 Section 7 of chapter 190 of the General Laws is hereby
90 amended by striking the entire section and substituting in
91 place thereof the following: — Every child shall inherit from
92 its natural parents and from their kindred heir, lineal and
93 collateral, in the same manner of a child born in lawful
94 wedlock.

95 Section 5 of chapter 190 of the General Laws is hereby
96 repealed.

97 Section 6 of chapter 190 of the General Laws is hereby
98 amended by striking the entire section and substituting in
99 place thereof the following: — If a child born out of wed-
120 lock, who has not been acknowledged or adopted by the
101 father dies intestate without lawful issue who may lawfully
102 inherit his estate, his estate goes to his mother, or in the case
103 of her decease, to her heirs at law.

104 Section 20 of chapter 191 of the General Laws is hereby
105 amended by inserting at the end of said section the follow-
106 ing: — For the purposes of this section, the word “children”
107 shall include all children whether or not born in lawful
108 wedlock, except if such child has been adopted in which case
109 section 7 of chapter 210 shall control.

110 Section 22 of chapter 191 of the General Laws is hereby
111 amended by striking the period at the end of the section and
112 inserting in place thereof the following: — “and children
113 born out of wedlock.”

114 Section 6 of chapter 207 of the General Laws is hereby
115 amended by striking the last seventeen words of the section
116 beginning with “and” and ending with “parents” and by
117 deleting the comma following the word “impediment” and
118 replacing same with a period.

119 Section 15 of chapter 207 of the General Laws is hereby
120 repealed.

121 Section 17 of chapter 207 of the General Laws is hereby
122 repealed.

123 Section 2 of chapter 210 of the General Laws is hereby
124 amended by striking the fourth clause and substituting in
125 place thereof the following: “of the mother only of the child,

126 if born out of wedlock,” and by adding at the end of the
127 section the following: “In the case of a child born out of
128 wedlock, the father of the child shall be notified of the
129 surrender or release of the child for adoption, or the inten-
130 tion to surrender or release said child, if (a) the father is or
131 has been married to the mother and the child is born during
132 marriage or within ten months after divorce; (b) the mother
133 and father have been married, though their marriage has
134 been declared void; (c) the father acknowledges the child in
135 writing filed with and approved by the probate court; (d) the
136 father receives the child into his family or lives with the
137 child or does other such acts indicating paternity; (3) the
138 marriage of father and mother has occurred after birth of
139 child; (f) the father consented to artificial insemination; (g)
140 the father is adjudicated the father of the child by court or by
141 competent jurisdiction, within 30 days after the birth of the
142 child if the child is surrendered or released for adoption at
143 birth or within 30 days after receipt of such notice of surren-
144 der or release, said father may petition the Probate Court for
145 the County where the child or the mother resides and
146 request a hearing as to whether it is in the best interests of
147 the child for said child to be surrendered or released for
148 adoption; after a hearing, the judge may take whatever
149 action is indicated to further the best interests of the child.

150 Section 6A of chapter 210 of the General Laws is hereby
151 amended by striking the last clause of the first paragraph and
152 substituting in place thereof, “provided that if such person is
153 born out of wedlock, the name, or names of and all other
154 facts relating to his natural parent, or parents, shall be omit-
155 ted from such certificate.

We do not recommend enactment of House No. 3436. This bill in its identical form was discussed in the 48th Report of the Judicial Council, at 164, and in the 51st Report, at 107. Our position in opposition to this bill has not changed since our earlier considerations of it and we refer our readers to those reports.

IV. CRIMINAL LAW AND
PROCEDURE

- A. Portrayal of Cruelty to Animals
- B. The Elderly and Violent Crimes
- C. Evasion of Fares
- D. Wrongful Death of Child - Notice to Parents

A. PORTRAYAL OF CRUELTY TO ANIMALS

HOUSE (1976) No. 1587

AN ACT TO DISCOURAGE CRUELTY TO ANIMALS IN THE
PRODUCTION OF COMMERCIAL VISUAL ENTERTAIN-
MENT MATERIALS.

*Be it enacted by the Senate and House of Representatives in General
Court assembled, and by the authority of the same, as follows:*

- 1 SECTION 1. For the purpose of this act:
- 2 (a) “Commercial Visual Entertainment Material”
- 3 (CVEM) shall mean any motion picture film, videotape, live
- 4 television broadcast or other means of projecting moving
- 5 visual images prepared for the purpose of making a profit.
- 6 CVEM shall not include documentary material. “Docu-
- 7 mentary inaterial” is any motion picture film, videotape,
- 8 live television broadcast, or other means of projecting mov-
- 9 ing visual images which depict natural conditions as they
- 10 occur, without staging for the purpose of filming.
- 11 (b) “Distributor” shall mean any natural person, corpora-
- 12 tion, or other legal entity, engaged in the sale or lease of
- 13 CVEM for the purpose of making a profit.
- 14 (c) “Exhibitor” shall mean any natural person, corpora-
- 15 tion, or other legal entity, who displays, broadcasts, or causes
- 16 to be displayed or broadcast, any CVEM for the purpose of
- 17 making a profit.
- 18 (d) “Animal” shall mean all vertebrates, excluding man.

- 1 SECTION 2. The attorney general, or any organization
- 2 for the protection of animals incorporated under the laws of
- 3 this Commonwealth, may maintain an action under the
- 4 provisions of this act in the Superior Court for the county
- 5 wherein the alleged violation of this act occurred, or where-
- 6 in the defendant is located, resides, or conducts business. A
- 7 distributor shall be considered to have conducted business in
- 8 any locality wherein CVEM distributed by him is exhibited.

1 SECTION 3. It shall be a violation of this act for any
2 distributor or exhibitor to sell, lease, display or broadcast, or
3 cause to be sold, leased, displayed or broadcast, any CVEM
4 filmed, taped, or broadcast after January 1, 1977 which:

5 (a) Contains any effects or scenes created by the use of any
6 contrivance, apparatus, or by any other means, which
7 results, or creates a substantial danger of resulting, in such
8 cruel and abusive treatment of an animal that, had the effect
9 or scene been created by such means in the Commonwealth,
10 it would have constituted a violation of any law of the
11 Commonwealth concerning protection of animals. Such
12 contrivances shall include but not be limited to any mecha-
13 nism designed to trap an animal.

14 (b) Contains any effects or scenes created by the killing of
15 an animal.

1 SECTION 4. In any action brought under the provisions
2 of this act the plaintiff has the initial burden of demonstrat-
3 ing that upon viewing the film, tape or broadcast a reasona-
4 ble man could believe that the effect complained of was
5 created in a manner prohibited by this act. If plaintiff meets
6 this initial burden, defendant incurs the burden of producing
7 evidence concerning the techniques employed in creating
8 the effect. Defendant may meet this burden by producing a
9 signed, sworn affidavit from the person or persons responsi-
10 ble for creating the effect, detailing the techniques used. If
11 defendant meets his burden, plaintiff has the ultimate bur-
12 den of establishing by a preponderance of the evidence that
13 the complained of exhibition or distribution was in violation
14 of the provisions of this act.

1 SECTION 5. Any party entitled to bring an action under
2 the provisions of this act may request injunctive or declara-
3 tory relief. Pending final determination of the action a preli-
4 minary injunction may be granted against exhibition or dis-
5 tribution of the subject CVEM, but such preliminary
6 injunction may be issued only after notice and an opportuni-
7 ty to be heard are afforded the defendant. To obtain a
8 preliminary injunction plaintiff must allege that the subject
9 CVEM is either currently or will in the immediate future be
10 exhibited or distributed in the Commonwealth, and it must
11 appear that plaintiff has a substantial likelihood of prevail-
12 ing on the merits of his claim.

1 SECTION 6. Any contract for the exhibition or distribu-
2 tion of any CVEM found to contain visual effects prohibited
3 by this act shall be unenforceable by any party to such
4 contract.

The foundation for statutes prohibiting cruelty to animals was definitively expressed by the Supreme Judicial Court in *Commonwealth v. Turner*, 145 Mass. 296, 14 N.E. 130 (1887). The *Turner* court, in holding that such a statute protected wild, as well as domestic, animals, stated:

The statute does not define an offence against the rights in property of animals, nor against the rights of animals that are in a sense protected by it. The offence is against the public morals which the commission of cruel and barbarous acts tends to corrupt.

Id. at 300.

The validity of all legislation on this subject is dependent on the preservation of public morals which wanton cruelty to living creatures is deemed to have a tendency to corrupt. In examining House No. 1587 in light of this standard, the Judicial Council finds it deficient and is constrained to oppose its enactment.

Only films containing visual effects which result, or create a substantial danger of resulting, in cruel and abusive treatment to an animal would violate the provisions of House No. 1587. However, the motion picture industry, it can be assumed, generally seeks to mirror reality in films. Thus, even scenes which do not result, or create a danger of resulting, in cruelty to animals would likely be indistinguishable by the viewer from scenes in which animals are actually harmed. If, then, House No. 1587 is intended to prevent the corruption of public morals, as the *Turner* standard demands, why should we not be as alarmed by the realistic portrayal of animal suffering which results from harmless techniques as by those scenes which result in actual harm to the animals?

The artificial distinction that this bill establishes demonstrates that its impact is inappropriately concentrated on protecting animals from harm in the creation of visual effects rather than on protecting the morals of the viewing public. It is this improper concentration that necessitates our opposition.

The sentiment of this bill is admirable. We note with interest, however, that at a time when violence to humans pervades all forms of visual entertainment, House No. 1587 would specifically exclude humans from its protection.

B. THE ELDERLY AND VIOLENT CRIMES

HOUSE (1976) No. 703

AN ACT INCREASING THE PENALTIES FOR THE COMMIS-
SION OF VIOLENT CRIMES UPON THE ELDERLY.

*Be it enacted by the Senate and House of Representatives in General
Court assembled, and by the authority of the same, as follows:*

1 Section 13A of chapter 265 of the General Laws, as most
2 recently amended by chapter 230 of the Acts of 1945, is
3 hereby further amended by inserting after the first para-
4 graph the following paragraph:
5 Whoever violates the provisions of this section by com-
6 mitting an assault or an assault and battery upon a person
7 sixty-two years of age or older shall be punished by imprison-
8 ment in a house of correction for not less than thirty days nor
9 more than two years for the first offense; and for a second or
10 subsequent offense by imprisonment in a jail or house of
11 correction for not less than six months nor more than two
12 and one half years or by imprisonment in the state prison for
13 not more than five years. The sentence imposed, for the first
14 offense, upon such a person shall not be reduced to less than
15 thirty days in a jail or house of correction, nor suspended nor
16 shall any person so sentenced be eligible for probation,
17 parole or furlough or receive any deduction from his sen-
18 tence for good conduct until he shall have served at least
19 sixty days of such sentence, provided however; the court
20 may, for the first offense, make an alternative disposition if
21 the following findings are made in writing in a specific case
22 — that the interests of justice and the public do not require a
23 mandatory sentence and that there exists alternative reme-
24 dies other than a mandatory sentence. The sentence
25 imposed, for a second or subsequent offense, upon such a
26 person shall not be reduced to less than six months, nor
27 suspended, nor shall any person so sentenced be eligible for
28 probation, parole or furlough or receive any deduction from
29 his sentence for good conduct until he shall have served at
30 least six months of such sentence. Prosecutions commenced
31 under this section shall not be continued without a finding or
32 placed on file.

House No. 703 attempts to isolate older persons from the rising crime rate by establishing a mandatory sentencing scheme for persons convicted of violent crimes on the elderly.

There is a superficial attraction to such laws as is evidenced by the current agitation for their enactment. We do not agree with the premise of this philosophy: that discretion in sentencing must be taken from the judges and that mandatory imprisonment of criminal offenders will deter crime. The recidivism rate of ex-convicts belies the deterrent effect of imprisonment. It would appear instead that prisons are better adapted for hardening rather than for rehabilitating the criminal.

Furthermore, in their attempts to strip judges of sentencing discretion, proponents of mandatory sentencing laws ignore the fact that discretion will likely be exercised on other levels. On the one hand, the prosecutor may bring a lesser charge against the defendant in order to avoid the mandatory sentence. Alternatively, jurors may hesitate to return a guilty verdict knowing that the law demands a mandatory sentence and feeling that the circumstances do not warrant it.

Rigidity in sentencing is no substitute for careful inquiry by a knowledgeable jurist. The judge is the one person in the criminal justice system who has the ability to tailor sentences to the needs of society and the individual in an attempt to prevent that individual's return to crime.

We believe the trend toward mandatory sentencing is a self-defeating proposition and should be avoided. Accordingly we oppose House No. 703.

C. EVASION OF FARES

HOUSE (1976) No. 984

AN ACT AMENDING THE LAW RELATIVE TO THE EVASION OF PAYMENT OF FARE.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

- 1Chapter 159 of the General Laws is hereby amended by
- 2striking out section 101 as appearing therein and inserting in
- 3place thereof the following section:
- 4SECTION 101. Whoever fraudulently evades or attempts
- 5to evade the payment of a toll or fare lawfully established by

6 a railroad corporation or railway company or by the Massa-
 7 chusetts Bay Transportation Authority, either by giving a
 8 false answer to the collector of the toll or fare, or by travel-
 9 ing beyond the point to which he has paid the same, or by
 10 leaving the train, car, motor bus or trackless trolley vehicle
 11 without having paid the toll or fare established for the dis-
 12 tance travelled, or otherwise, shall forfeit not less than fifty
 13 nor more than one hundred dollars. Whoever attempts to, or
 14 does enter or leave a Massachusetts Bay Transportation
 15 Authority station or vehicle without the payment of the
 16 required fare upon demand may, if committed in the pres-
 17 ence of a Massachusetts Bay Transportation Authority
 18 police officer, as set forth in Chapter 664 of the Acts of 1968
 19 as amended, or Railway Police Officer as set forth in Section
 20 93 of Chapter 159 of the General Laws as amended, be
 21 arrested without a warrant. Whoever does not upon demand
 22 first pay such toll or fare shall not be entitled to be trans-
 23 ported for any distance, and may be ejected from a railway
 24 car, motor bus, trackless trolley vehicle or any Massachusetts
 25 Bay Transportation Authority vehicle or station.

We are of the opinion that it is not advisable for the Judicial Council to express any view on this proposed legislation. Therefore, the Council respectfully requests that it be excused from making a recommendation on this matter.

D. WRONGFUL DEATH OF CHILD - NOTICE TO PARENTS

SENATE (1976) No. 702

AN ACT RELATIVE TO NOTICE TO PARENTS IN CASES IN WHICH THEIR MINOR CHILDREN HAVE BEEN KILLED.

Be it enacted by the Senate and House of Representatives in General Court assembled and by the authority of the same, as follows:

1 The clerk of any court in which a complaint is sought or
 2 trial of a complaint is held against any person for causing the
 3 death of a minor by reason of the operation of a motor
 4 vehicle or street car shall notify the parents of such a minor
 5 of the hearing on the application for such complaint or of the
 6 trial of such case.

We oppose enactment of Senate No. 702. Although the notification system which this bill proposes would enable parents to obtain evidence for later wrongful death actions, this benefit is diminished by the

fact that notification would only be given when the child's death is the result of a motor vehicle or streetcar accident.

Apart from the serious deficiency that this limitation imposes on the effectiveness of the bill, several important points are omitted from the bill. There is no practical mechanism included in the bill to alert the clerk of court that a particular case comes within the criteria of the statute requiring notification to the parents. Furthermore, it does not establish either the scope of the notice to be given or the effect of failure to notify.

It may be possible to establish a rule of court to implement such a notification procedure, but we feel that Senate No. 702 would be ineffective in achieving any meaningful results in this area.

OFFICE OF MASSACHUSETTS
**JUDICIAL COUNCIL
OF
MASSACHUSETTS**



**53rd REPORT
1977**

**THE ADMINISTRATION OF JUSTICE
STANDARD SHORT FORM CLAUSES IN WILLS AND TRUSTS
STANDARDS IN CONTESTED CHILD PLACEMENTS
UNIFORM EMINENT DOMAIN CODE**

MEMBERS OF THE COUNCIL
(JANUARY 1978)

JACOB J. SPIEGEL *of Boston*, CHAIRMAN
PAUL T. SMITH *of Boston*, VICE CHAIRMAN
SALLY CORWIN *of Newton Highlands*
CLIFFORD E. ELIAS *of North Andover*
LAWRENCE F. FELONEY *of Cambridge*
DONALD R. GRANT *of Lexington*
JACOB LEWITON *of Belmont*
THOMAS R. MORSE, JR. *of Boxborough*
ALFRED L. PODOLSKI *of Dedham*
WILLIAM I. RANDALL *of Framingham*
BERGE TASHJIAN *of Westborough*

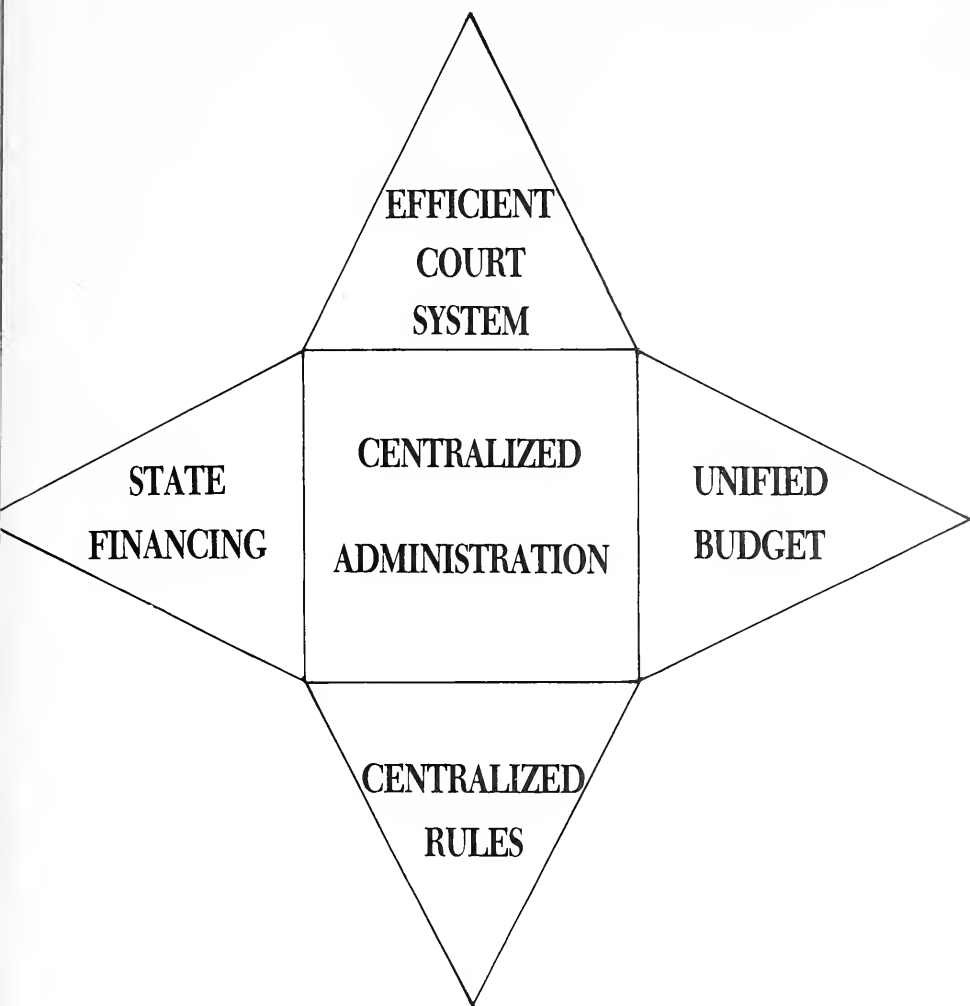
JAMES B. MULDOON *of Weston*, Secretary
Two Center Plaza, Boston, Mass. 02108

INQUIRIES CONCERNING THE JUDICIAL COUNCIL

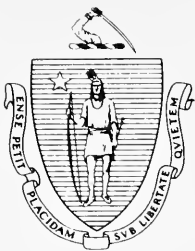
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Persons interested in matters under consideration by the Judicial Council and in the improvement of the judicial system of the Commonwealth are invited to communicate with the Secretary of the Judicial Council, James B. Muldoon, 2 Center Plaza, Boston, Massachusetts 02108.

THE UNIFICATION CONCEPT



This figure demonstrates the concept of a unified court structure as has been proposed for the Massachusetts judicial system.



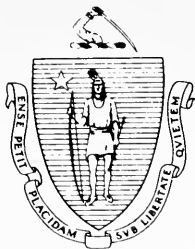
53rd REPORT

Judicial Council of Massachusetts —1977—

CONTENTS OF THIS REPORT

THE ACT CREATING THE JUDICIAL COUNCIL	4
MEMBERSHIP OF THE JUDICIAL COUNCIL	inside cover
TABLE OF LEGISLATION REFERRED TO THE JUDICIAL COUNCIL IN 1977	5
I. GENERAL OBSERVATIONS ON THE ADMINISTRATION OF JUSTICE	6
A. The Debate on Unification	6
B. Criminal Trials and Trials De Novo	12
C. Judges — Salaries	14
D. Jury — Composition: Fewer Exemptions and Shorter Period of Service	17
II. PROBATE	19
A. Standard Short Form Clauses in Wills and Trusts ..	19
1. Massachusetts Statutory Optional Fiduciary Powers	28
2. Massachusetts Statutory Disability Discretion ...	33
3. Massachusetts Statutory Principal Discretion	33
4. Statutory Custodianship Trusts	34
B. Custody — Standards in Contested Child Placements	36

III. CRIMINAL LAW AND PROCEDURE	51
A. Portrayal of Cruelty to Animals	51
IV. PROPERTY	54
A. Eminent Domain — Uniform Eminent Domain Code	54



The Commonwealth of Massachusetts

April, 1978

THE HONORABLE MICHAEL S. DUKAKIS
Governor of Massachusetts

Dear Governor Dukakis:

In accordance with the provisions of Chapter 221, Section 34A of the General Laws, we have the honor to transmit the fifty-third report of the Judicial Council for the year 1977.

JACOB J. SPIEGEL, CHAIRMAN
PAUL T. SMITH, VICE CHAIRMAN
SALLY CORWIN
CLIFFORD E. ELIAS
LAWRENCE F. FELONEY
DONALD R. GRANT
JACOB LEWITON
THOMAS R. MORSE, JR.
ALFRED L. PODOLSKI
WILLIAM I. RANDALL
BERGE TASHJIAN

JUDICIAL COUNCIL

G.L. Chapter 221, §§34A-34C

The Judicial Council Was Established To Make A Continuous Independent Study Of The Organization, Procedure, And Practice Of The Courts.

The Council Makes Recommendations Requested By The Legislature And Suggests Improvements In The Administration Of Justice.

Statutory Authority

Section 34A. There shall be a judicial council for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and the results produced by that system and its various parts. Said council shall be composed of the chief justice of the supreme judicial court or some other justice or former justice of that court appointed from time to time by him; the chief justice of the appeals court or some other justice or former justice of that court appointed from time to time by him; the chief justice of the superior court or some other justice or former justice of that court appointed from time to time by him; the chief judge of the probate courts in the commonwealth or some other judge or former judge of those courts appointed from time to time by him; the judge of the land court or some other judge or former judge of that court appointed from time to time by him; the chief justice of the district courts in the commonwealth or some other justice or former justice of those courts appointed from time to time by him; the chief justice of the municipal court of the city of Boston or some other justice or former justice of that court appointed from time to time by him; and not more than four members of the bar all to be appointed by the governor, with the advice and consent of the executive council. The appointments by the governor shall be for such periods, not exceeding four years, as he shall determine.

Section 34B. The Judicial Council shall report annually on or before December first to the governor upon the work of the various branches of the judicial system. Said council may also from time to time submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable.

Section 34C. No member of said council, except as hereinafter provided, shall receive any compensation for his services, but said council and the several members thereof shall be allowed from the state treasury out of any appropriation made for the purpose such expenses for clerical and other services, travel and incidentals as the governor and council shall approve. The secretary of said council, whether or not a member thereof, shall receive from the Commonwealth a salary of ten thousand dollars.

**1977 HOUSE AND SENATE BILLS
REFERRED TO THE JUDICIAL COUNCIL**

1977 Bill Number	Subject Matter	Page In This Report
H 1648	An Act to provide for optional short form standard clauses for wills and trusts and for statutory custodianship trusts	19
H 2006	An Act to discourage cruelty to animals in the production of commercial visual entertainment materials	51
H 2018	An Act providing for standards in contested child placements	36
H 3752	An Act establishing a uniform eminent domain code	54

I.

GENERAL OBSERVATIONS IN THE ADMINISTRATION OF JUSTICE

We have issued two reports covering the whole field of judicial administration in 1977.

A. The Debate on Unification

During the year 1977, the "Great Debate" on the unification of all of the trial courts into a single system, which we anticipated in our 51st Report in 1975, took place.

The original proposal which arose out of a Report by the Governor's Select Committee on Judicial Needs was embodied in House bill 4400 of 1977.

It was apparent that this bill, as originally drafted, failed to satisfy the requirements of the many diverse interests which are concerned with the judicial system. The General Court conducted extensive hearings throughout the Commonwealth and worked assiduously on a revamping of the proposals of House bill 4400.

It was soon evident that there was little sympathy for the elimination of the specialized courts — the Land Court, the Probate Court and the Housing Court.

The Supreme Judicial Court suggested that these specialized courts be divisions of a unified Superior Court.

One Trial Court or Two?

In the proposals for legislation which were debated and discussed during 1977, a question which received considerable attention was whether the Commonwealth should have one single unified trial court or a two-tier system.

The classic single tier "unified trial court" system was suggested as a model as far back as 1907. But subsequent developments in legal thinking have lead to the conclusion that there is no guarantee of success with a single tier of trial courts. It does appear from a comparative analysis of progress in judicial administration throughout the United States that there is more promise in other systems. The system finally agreed upon by the members of the Judiciary Committee and the General Court in 1977 is a new Massachusetts Trial Court with its various departments.

The Recent Movement for "Reform"

Although the Report of the Governor's Select Committee on Judicial Needs represents the most recent effort with regard to reorganization of our judicial system, the Judicial Council has urged, almost since the beginning of its existence, many of the positive measures which have been embodied in the draft legislation which is pending before the General Court at the time of this 53rd Report.

Among the measures which we have supported are the phasing out of the special justices, temporary service by certain retired justices, additional Superior Court judges, massive expansion of the administrative arm of the entire judicial system in order that efficiency and economy in public service might be achieved, assumption of the costs of the judicial system by the Commonwealth, an appropriate Judicial Conduct Commission, a unified District Court of the Commonwealth, a unified budget, jury reform to the end that an individual would be tried by a jury of his peers and an adequate salary schedule for the Judiciary.

In reviewing the pending bills for a reorganized judicial department (House bill 1000, Senate bill 1322 and Senate bill 710 of 1978) and with the recent memory of the action of the 1977 General Court session, it would appear to us that the substance of what we have previously recommended, and what has been recommended in part by the Governor's Select Committee on Judicial Needs, has been included in this draft legislation. We also note that this draft legislation, if enacted substantially in the form introduced, would measure up to the expectations of those who have viewed judicial reorganization from the national level.

It is obviously of concern to the General Court that these proposals will result in the necessity to have additional tax revenues at the state level in order to support the entire judicial system. From the debate which has been taking place in the past year or so, it is apparent that the assumption of the costs of the judicial system by the Commonwealth will add to the state budget, yet will lessen the demand for tax revenues at the municipal level. This is a question of tax policy and municipal and state finance as to which we do not feel called upon to give our opinion. The matter is best left to the General Court.

No Panacea

We do not believe that the enactment of the reorganization legislation will prove to be a panacea for all the ailments of the judicial system. We did not believe that the system was at the "brink of disaster" nor do we feel that we have now found the perfect solution. There is now more need than ever to observe the operation of the judicial system when and if the new legislation is finally adopted by the General Court and becomes a law of the Commonwealth.

Obviously it is impossible for a statute, or a series of statutes, to contain in exquisite detail all of the fine points of judicial administration and court operations. In the system that has been accepted by most, and as demonstrated in the three pending bills, there is to be a strong accent on the role of the judicial administrator or administrative judge.

It is interesting to note and to admire the progress that has been made in our courts even without the massive reorganization bill. It will be mandatory that the progress of the reorganized system be closely watched by the General Court and all other interested parties to determine whether the purposes of the legislation are being achieved. The purposes will not be fulfilled overnight.

The Aim of the Judicial Council

Back in 1921 when the concept of a Judicial Council was being discussed, a Judicature Commission made the following observations:

The legislative committees on the judiciary and on legal affairs are in constant session every year hearing petitions for legislations of every variety relative to the courts, submitted mainly by individuals. Some of these suggestions have been carefully prepared and thought out, while many of them have not. These committees render good service to the Commonwealth in dealing with such proposals. Both of these committees, however, are overburdened with the many petitions for legislation presented to them every year, in addition to the work of the individual members in other connections.

It is not a good business arrangement for the Commonwealth to leave the study of the judicial system and the formulation of suggestions for its development almost entirely to the casual interest and initiative of individuals. The interest of the people, for whose benefit the courts exist, calls for some central clearing house of information and ideas which will focus attention upon the existing system and encourage suggestions for its improvement.

It does not seem advisable that this body should be too formal in its character or in its deliberations. The main point is that there shall be an officially recognized body of judges and members of the bar who are expected to meet for the mutual exchange of views and the discussion of practical questions, to whom suggestions may be made, and who will report annually. The Commission believes that such discussions would gradually result in many valuable improvements in the courts of the Commonwealth and the methods of administration and practice.

For these reasons the Commission recommends legislation to provide for a judicial council, and submits a draft of such legislation; and we believe that this recommendation of such a council, with such functions as are outlined above, will appeal to the business sense of the community.

It is the intention of the Judicial Council to continue to make recommendations in accordance with statutory authority contained in General Laws Chapter 221, sections 34 *et. seq.*

The Judicial Council in the discharge of its statutory duty of oversight will be particularly concerned with the radical changes in the judicial system which are called for in the legislation pending at the time of this Report. It will continue to determine the effectiveness of the judicial system to serve the people of the Commonwealth and will make its observations and recommendations to the executive and legislative departments as it has done in the past.

The Judicial Council is not a large organization. Desirable as it may be for the Judicial Council to engage in the broad and all encompassing projects permitted by the statute creating the Council, it is obvious that with the limited budget under which the Judicial Council is obliged to operate, it is well nigh impossible for the Council to engage fully in such projects. Nevertheless, and because the Council includes those members of the Judiciary who are most active in the administration of justice, active lawyers, and representatives of both Appellate Courts, we continue to be in a position to make value judgments and advise on policy questions.

Statistics

It should concern the General Court and the executive branch that the statistics pertaining to court operations are not as quickly available as they might be. During the first thirty or so years of its existence, statistics on court operations were gathered by the Judicial Council. When the Office of the Executive Secretary of the Supreme Judicial Court was created, the responsibility for gathering statistical information was transferred from the Judicial Council to

the Executive Secretary of the Supreme Judicial Court. The Executive Secretary has filed Annual Reports on a fiscal year basis indicating the major statistics of the judicial system of the Commonwealth. In making such Reports, the Executive Secretary has had to depend upon information which was gathered from various courts and assemble such information, analyzing and interpreting and presenting it in an understandable fashion. This has caused a time lag in some cases to the end that we have not known quickly, until very recently, the kind of statistics that we need for planning the deployment of the manpower and the facilities of the judicial branch. During 1977, as a result of the use of the computer, statistical information was, in some instances, more readily available in a timely way. The General Court should insist that this effort toward the production of current and useful statistical information on the judicial system should continue.

It would appear that the chief justice who administers our District Courts of the Commonwealth will prepare statistical information pertaining to those courts, and the chief administrative justice of the Superior Court (which will include the specialized departments) will prepare statistical information on that court.

It seems to us that all of this information must be embodied in an annual statistical report by the office of the chief administrative justice. Without such information on a timely basis, the General Court, the public, and the executive branch may have to continue with mere estimates of what is currently necessary.

We find ourselves in the same position. In dealing with the judicial system on a day to day basis, one gets a sense of the direction in which the system is headed, some of its problems, and some of the efforts that are being made to make it more efficient; but without recent significant statistics, there is no assurance that a decision is the correct one or that a program is necessary.

Massachusetts Is Not Unique

During the recent debate over court reorganization, one might get the erroneous impression that Massachusetts was somehow unique in the ills and deficiencies which were attendant upon its judicial system. One might have thought that the "reforms" and the proposals for change which initiated with the Governor's Select Committee on Judicial Needs were born within sight of the Bunker Hill monu-

ment. Nothing could be further from the truth. Not only has there been a steady movement for judicial reorganization for the last two generations within the Commonwealth, but there has been a similar nationwide movement of considerable intensity for the last ten years.

We cannot permit ourselves to become provincial with regard to the proposals which are suggested to the General Court here. We cannot lose sight of the fact that parallel developments, parallel political arguments, and parallel economic questions are being actively debated in many other states. A review of several other states clearly demonstrates that the problems we face in Massachusetts in 1978 are national problems.

In New Jersey, for example, Chief Justice Richard J. Hughes, who served as governor from 1962 to 1970, stated in his first "State of the Judiciary" message (in 1977) to the New Jersey legislature:

. . . the courts are confronted today with large new areas of judicial responsibility — environmental law, civil-rights law, consumer law, products liability and malpractice law, prison-rights cases, — an almost endless list of new burdens thrust upon the courts, not so much by their own choice as by the converging pressures of this half of the 20th century.

Chief Justice Hughes also made the statement that in New Jersey:

. . . in the area of civil litigation, a crisis situation is upon us. This condition diminishes the image of justice to an alarming degree; if uncorrected, it will some day shame the state.

It is not only the new "burdens" which consume so much of the time and attention of those of the judicial branch, it is the often painful political movement throughout the entire United States to effect significant changes in the judicial branch of state governments.

Although many of the ideas which are now embodied in pending legislation are the result of plans and proposals at the national level and have actually been placed in effect in other states, it is too soon to know what is the most efficacious plan. It clearly appears that there is no plan of universal application. The kind of judicial system we will have must necessarily result from a political decision by the people or by their elected representatives. The evidence is clear from statewide referenda and constitutional conventions that the voters everywhere are demanding more professionalism, absolute integrity, and much more service from their judicial systems. The evidence is equally clear that these demands cannot be met without increased appropriations for the judicial branch and that requests for substantial additional funds are not met with enthusiasm by legislative leaders throughout the nation.

Thus, the past year found us living in an atmosphere of judicial reform which was manifested nationwide.

The enactment of the pending legislation in the form which is substantially contained in House bill 1000, Senate bill 710 and Senate bill 1322 will be a milestone, but the road is long and the way is not straight.

B. Criminal Trials and Trials De Novo

Perhaps the most immediately apparent change under the reorganization legislation will be the new procedure for all criminal cases which arise in the divisions of the District Court department.

It will be necessary for the General Court to observe the operation of the new system closely in order to detect early warning signs of the kind of backlog which has caused so much concern in the Superior Court. The new procedure is intended to eliminate the long delays which now exist.

It will also be necessary to determine whether or not the District Court department can dispose of its immense case load and also manage the new de novo procedure without the necessity for additional judicial and staffing personnel.

New Procedure

Under the proposals pending, Section 27A of Chapter 218 of the General Laws would be amended to permit the following procedure in criminal cases which arise in the District Court department.

Step 1. After the issuance of the complaint, the defendant must appear for arraignment, pre-trial proceedings and initial trial in the division of the District Court department which has jurisdiction and venue in a given case. In this step there is no change from the long established procedure and it is hoped that the vast majority of lesser criminal cases will continue to be disposed of at this juncture. Following the bench trial the case is concluded with a sentence, a dismissal, or a continuance or other lawful disposition.

Step 2. CLAIM FOR TRIAL BY A JURY OF SIX: This appeal is to be taken by the defendant after the result under

Step 1. The term “appeal” may well be a misnomer. It is better termed a claim for a Jury Trial.

The trial before a Jury of Six will take place in the same division where the case was originally heard if a jury session has been established there. If no jury session is available in that division, the jury trial will take place in a division in the same county where a Jury of Six session is available or in an adjacent county which is designated for that type of session.

Step 3. TRIAL: The trial by a Jury of Six will be the same kind of proceeding that now takes place in the Superior Court before a Jury of Twelve. The case will be prosecuted by an Assistant District Attorney, a stenographic record will be made, and the same practices and rules applicable to a criminal trial in the District Court will apply.

Step 4. APPEAL: If the defendant will not accept the result of the trial by a Jury of Six, which is, of course, a completely new trial or de novo proceeding, and the disposition then made by the judge, the defendant may *appeal* to the Appeals Court.

Step 5. APPEALS COURT: The Appeals Court is required to “review” the conviction under the Rules of Appellate Procedure and the relevant statutes in the same manner as if the appeal was from the Superior Court department of the Trial Court.

Step 6. SUPREME JUDICIAL COURT: While it is likely that the decision of the Appeals Court would be final, there is a possibility of further appeal to the Supreme Judicial Court under Chapter 211A, Section 11 of the General Laws or even by direct application to the Supreme Judicial Court.

Impact on the District Court Department

The Judicial Council was reluctant to endorse the new procedure for handling “de novo appeals” for but one basic reason. It was felt that the impact of handling about 15,000 cases in which a jury trial was claimed might impair the ability of the District Courts of the Commonwealth to deal expeditiously with the over 208,000 “significant” criminal cases on their dockets.

It can be predicted on the basis of past experience that only about 10% of the cases in which there is a claim for a jury trial (after a hearing before a judge alone) will result in a full blown jury trial. Some have predicted that, at least in the near future, more jury claims will be filed than under the existing system

It is imperative that the General Court be given accurate statistics on the operation of the new *de novo* system together with a full report on the quality of justice being delivered under that system. It is the intention of the Judicial Council to concentrate on this area from the very outset and to report fully on the matter to the executive and the General Court.

If additional personnel are needed to make this system work, the General Court will have to find the ways and means to supply such personnel. We will be fortunate if the new procedure will operate with existing personnel. We note that the various district attorneys are already seeking additional attorneys to strengthen the ranks of the prosecutors working in the District Court department. Professionalism in judicial administration absolutely dictates that the prosecutor in a jury trial be an attorney and not a police officer.

C. Judges — Salaries

When salary increases were proposed for Massachusetts judges, there was some criticism as to the amount of the proposed increase. It may be of interest to consider the experience both in Massachusetts and in two other states during the past year or so. In Kansas we find a situation where the trial court system was improved and many part-time judges are to be eliminated. Both these goals have concerned us in Massachusetts recently.

The salary structure in Kansas in 1977 was as indicated below; the increase suggested by a citizens committee is given, and the increase approved by the Judiciary Committee is shown.

	<i>Established</i>	<i>Requested</i>	<i>Approved</i>
Supreme Court (C.J.)	\$35,000	\$44,500	\$44,500
Supreme Court (Assoc.)	34,000	43,000	43,000
Appeals Court (C.J.)	34,000	42,000	42,000
Appeals Court (Assoc.)	33,000	41,000	39,000
District Court	30,500	39,000	39,000

Associate Judges

District Court ¹	22,000	37,000	37,000
Dist. Magistrates ²	9,000 —	18,000	
	12,000		

These increases in Kansas are in the range of \$8,500 to \$9,000.

In Kansas, as in Wisconsin and in other jurisdictions, portions of the salary of a judge may be paid from two or even three sources — state, county and municipality. It is the aim of all concerned with the courts that the judicial salary be paid by the state.

In Georgia the Judiciary received a \$6,000 pay increase in early 1978 and even this amount was \$4,000 less than the scale recommended by the Georgia State Commission on Compensation.

In New Jersey a bill was signed by Governor Byrne in January, 1978 granting a pay raise of \$8,000 a year to all members of the Judiciary. Earlier, Chief Justice Hughes had asked for increases of \$12,500 per year. Some of the New Jersey salaries are shown by this table.

	<i>1977 Salary</i>	<i>Increase Requested to</i>	<i>Increase Granted to</i>
Trial Court Judges	\$42,000	\$54,500	\$48,000
Appellate Judges	45,000	57,500	53,000
Supreme Court Judges	45,000	57,500	56,000

It appears from the recent experience in these states and in Massachusetts that the legislatures have recognized that without adequate salaries, judicial positions do not attract and hold the best people; and that inflation has adversely affected the Judiciary.

National Averages

The National average salaries in 1977 were³:

State Supreme Court	\$41,301
State Intermediate Appellate	41,231
State General Trial Court	35,098

The range average in 1977 was:

State Supreme Court	\$29,000 (Maine)	to \$62,935 (Cal.)
State Intermediate Appellate	\$33,000 (Kansas)	to \$59,002 (Cal.)
State General Trial Court	\$30,000	to \$49,166 (Cal.)

¹These judges would not be members of the bar and would be full time.

²These judges may be part-time non-lawyers.

³National Center for State Courts, July 1977 Vol. 3 No. 5. There is clear evidence of an increase since the date of this survey.

Massachusetts Salaries

The increases included in the Massachusetts budget by Chapter 872 of the Acts of 1977 are as follows:

	<i>Prior to July 31, 1977</i>	<i>July 31, 1977</i>	<i>October 1, 1978</i>	<i>September 30, 1979</i>
SUPREME JUDICIAL CT.				
Chief Justice		\$44,563	\$45,088	\$45,680
Associate Justice	\$40,788	43,079	43,604	44,204
APPEALS COURT				
Chief Justice		41,472	41,997	42,597
Associate Justice	37,771	39,987	40,512	41,112
SUPERIOR COURT				
Chief Justice		39,987	40,512	41,112
Associate Justice	36,203	38,379	38,904	39,504
PROBATE COURT				
Chief Justice		35,039	35,564	36,164
Associate Justice	30,168	33,803	34,328	34,928
LAND COURT				
Judge	36,203	38,379	38,904	39,504
Associate Justice	36,203	38,379	38,904	39,504
HOUSING COURT				
Judge	36,203	38,379	38,904	39,504
Associate Justice (Boston)		34,542	38,904	39,504
DISTRICT COURT and BOSTON MUNICIPAL CT.				
Chief Justice		33,803	34,328	34,928
Associate Justice	30,168	32,193	32,718	33,318
JUVENILE COURT				
Boston	30,778	33,803	34,328	34,928
Worcester, Bristol, Springfield		32,193	32,718	33,318

It is apparent that the Massachusetts salary schedule is near or a bit better than the July, 1977, national average, but clearly a lot less than the new schedule for New Jersey, for example, where the general trial court judges will get \$48,000 a year contrasted to \$41,112 in Massachusetts on September 30, 1979.

We also should keep in mind that talented individuals must be offered competitive salaries or they will not leave the practice of law for a seat on the bench. The General Court must concern itself with this ongoing necessity.

D. Jury — Composition: Fewer Exemptions and Shorter Period of Service.

Chapter 415 of the Acts of 1977 entitled “An Act regulating the selection and management of jurors for Middlesex county” is an experiment by the Commonwealth in jury selection and management. Section 1 sets forth the purposes of this Act as follows:

- a. To guarantee that each grand and trial jury is selected from a fair and randomly drawn cross-section of the population;
- b. To eliminate all statutory exemptions from the duty to perform grand and trial juror service;
- c. To eliminate all discretion in the qualification of prospective jurors;
- d. To eliminate or reduce the possibility of economic coercion of jurors by employers and to eliminate or reduce the possibility of economic penalty or hardship upon jurors;
- e. To implement the strict policy that juror service is a solemn public duty which every citizen must perform in accordance with this act;
- f. To spread the duty of juror service over the broadest possible base and thereby to maximize the participation and education of the citizenry in the judicial branch;
- g. To improve the system of selecting and managing jurors, to improve the utilization of trial jurors in the juror pools, to authorize the use of modern data processing methods and equipment, and to make the entire system more accessible to the public;
- h. To determine the feasibility of this act for application, in all counties of this commonwealth by enactment first in Middlesex county.

In order to accomplish these objectives, the Act establishes a detailed and comprehensive procedure for selecting prospective jurors. An integral part of this procedure is the establishment of an office of jury commissioner who will be primarily responsible for implementing the Act.

Among the most significant aspects of the Act are the drastic reduction in the period of service and the elimination of all statutory exemptions from jury duty. Whereas the present length of jury duty is one month, §33 of the Act shortens this period to two (2) days with certain exceptions. Subsection 1 of Section 2 provides that “[n]o citizen shall be excluded or exempted from serving as a grand

or trial juror . . . because of race, color, religion, sex, national origin, *economic status*, or *occupation*.” (Emphasis added) Such language indicates the intent of the legislature to establish the broadest possible base in the population from which to draw jurors and eliminates many well established exemptions such as lawyers, doctors, legislators, government officials and clergy.

Although the Act does vest the trial judge with the discretion to excuse a juror either permanently or temporarily because of undue hardship, a peculiar public necessity or similar extraordinary circumstances, a great many individuals previously exempt from jury duty will now be obligated to serve. In this respect and others, the Act is consistent with a trend on the national level to reform the much criticized jury system. As a result of the widespread exemptions now existing throughout the country, it is the consensus of those involved with the jury issue that many defendants are not receiving a trial by a jury of their peers. This syndrome is especially noticeable when the defendant is from a better educated or better trained segment of the population. Rarely does such a defendant benefit from a jury of his “peers”; more often than not, his peers are exempt from jury duty.

Although the sentiment of such an Act is admirable, a blanket elimination of exemptions might prove unwise. The most obvious example where the lack of exemptions might prove detrimental is in the case of attorneys and other court officers. Because of their familiarity and expertise with the law, they might very well adversely affect jury deliberations. This is especially noticeable in the case of evidentiary rulings where an experienced lawyer might recognize the erroneous exclusion or inclusion of evidence by the trial judge and, either consciously or unconsciously, influence the jury.

Notwithstanding such possible drawbacks, the implementation of this Act in Middlesex county is a positive step toward the elimination of present abuses in the jury system. Hopefully, the experiment will be a successful one and, after various modifications in the Act as dictated by future experience in Middlesex, a new and effective system of jury selection and management will be available to the Commonwealth as a whole.

II PROBATE

A. STANDARD SHORT FORM CLAUSES IN WILLS AND TRUSTS

B. CUSTODY — STANDARDS IN CONTESTED CHILD PLACEMENTS

A. STANDARD SHORT FORM CLAUSES IN WILLS AND TRUSTS

HOUSE (1977) No. 1648

AN ACT TO PROVIDE FOR OPTIONAL SHORT FORM
STANDARD CLAUSES FOR WILLS AND TRUSTS AND FOR
STATUTORY CUSTODIANSHIP TRUSTS.

*Be it enacted by the Senate and House of Representatives in
General Court assembled, and by the authority of the same, as
follows:*

1 SECTION 1. The General Laws are hereby amended by
2 inserting after Chapter 184A the following chapter: —

3 Chapter 184B — SHORT FORM CLAUSES FOR WILLS
4 AND TRUSTS

5 *Section 1.* The terms defined in this chapter may be used in any
6 will or trust and, except as otherwise provided in the instrument,
7 shall have the full force, meaning and effect of the words by which
8 they are so defined. Adoption or employment in substance of a
9 defined term in the instrument shall be a sufficient incorporation
10 by reference of the applicable section of this chapter as it is in effect
11 at the date of the execution of the instrument, but this provision
12 shall not preclude other methods or incorporation of any section in
13 part only or subject to such modification as the incorporating
14 instrument may provide. An attorney at law preparing a will or
15 trust which uses a term defined in this chapter shall furnish to the
16 testator or settlor a copy of the section of this chapter by which the

17 term is defined, but failure to do so shall not affect the validity of
18 the incorporation by reference.

19 *Section 2.* The following powers shall be known as the
20 “Massachusetts Statutory Optional Fiduciary Powers” and may
21 be conferred by reference upon any fiduciary in addition to all
22 common law and other statutory authority:

23 The fiduciary shall have the power without approval of any
24 court:

25 (a) to retain any property in the form in which it is received
26 and, while a trust is revocable by the settlor, to purchase or retain
27 any property the purchase or retention of which is requested by the
28 settlor;

29 (b) to accept additional property in any trust hereunder from
30 any source and upon any special terms;

31 (c) with respect to any tangible personal property, to repair,
32 store, insure or otherwise care for such property and to pay such
33 shipping or other expense relating to such property as the fiduciary
34 deems advisable;

35 (d) to abandon any property which the fiduciary determines to
36 be worthless;

37 (e) to invest principal and income in such property as the
38 fiduciary may determine, and in so doing the fiduciary shall not be
39 subject to the limitations placed by law on investments by
40 fiduciaries and, without limiting the generality of the foregoing, to
41 invest in investment company shares or in shares or undivided
42 portions of any common trust fund established by any fiduciary
43 without notice to any beneficiary;

44 (f) to sell, exchange, or otherwise dispose of the property at
45 public or private sale on such terms as the fiduciary may determine,
46 no purchase being bound to see to the application of any proceeds;

47 (g) to lease the property on such terms as the fiduciary may
48 determine although the term may extend beyond the time when it
49 becomes distributable;

50 (h) to decide all questions between principal and income
51 according to law;

52 (i) to keep registered securities in name of nominee;

53 (j) to pay, compromise or contest claims or controversies
54 (including claims for estate or inheritance taxes) in such manner as
55 fiduciary may determine;

56 (k) to participate in such manner as the fiduciary may determine
57 in any reorganization, merger or consolidation of any entity the

58 securities of which constitute part of the property held, and to
59 deposit such securities with voting trustees or committees of
60 security holders even though under the terms of deposit such
61 securities may remain deposited beyond the time when they
62 become distributable, to vote upon any securities in person or by
63 special, limited or general proxy, with or without power of
64 substitution, and otherwise to exercise all rights that may be
65 exercised by any security holder in his individual capacity;

66 (l) to borrow such amounts as the fiduciary may consider
67 necessary to obtain cash for any purposes for which funds are
68 required in administering the estate or trust, and in connection
69 therewith, to mortgage or otherwise encumber any property on
70 such conditions as the fiduciary may determine although the term
71 of the loan may extend beyond the time that would otherwise be
72 needed for completing the administration of the estate or beyond
73 the term of the trust;

74 (m) to allot in or towards satisfaction of any payment,
75 distribution or division, in such manner as the fiduciary may
76 determine, any property held at then current fair market values
77 determined by the fiduciary;

78 (n) to hold trusts and shares undivided or at any time to hold the
79 same or any of them set apart one from another;

80 (o) to lend, borrow, buy or sell on commercially reasonable
81 terms to or from any fiduciary acting under another instrument
82 made by the testator or settlor, and

83 (p) to combine all or part of the property for investment with
84 property held by a fiduciary acting under another instrument upon
85 substantially similar terms made by the testator or settlor or by his
86 or her spouse, except that property qualifying for a marital or
87 charitable deduction for federal tax purposes may not be so
88 combined.

89 Such powers shall be subject to such exceptions, limitations and
90 conditions as to property otherwise qualifying for marital or
91 charitable deductions allowable under federal tax laws as are
92 contained in all special provisions relating thereto in the
93 instrument or as may be necessary to conform to the requirements
94 of federal tax laws at any time applicable for qualification of such
95 property for such deduction, including consent of the surviving
96 spouse, if any, of the testator or settlor, if so required. Such powers
97 (except as expressly limited in the instrument) may be exercised by
98 the person or persons for the time being serving as such fiduciary,

99 whether or not named therein. Powers conferred on the fiduciary
100 shall be exercised only in accordance with a reasonable discretion.
101 No power conferred upon the fiduciary in this section shall be
102 exercised in favor of any person then serving as fiduciary nor in
103 favor of his estate or his creditors, or the creditors of his estate.

104 *Section 3.* The following discretion, which shall be known as
105 the “Massachusetts Statutory Disability Discretion,” may be
106 conferred by reference upon any fiduciary, and, unless otherwise
107 provided in the instrument by which it is conferred, shall apply to
108 all distributions to be made under the terms of the instrument or
109 under powers or discretions granted to the fiduciary by the
110 instrument to a minor, to a person under such other age as may be
111 specified in the instrument, or to a person whom the fiduciary
112 determines to be unable to properly care for his property by reason
113 of advanced age, mental weakness of physical incapacity;

114 The fiduciary may make distribution to any person to whom this
115 discretion is applicable or apply or distribute the same for his
116 benefit or account, or retain all or any part of the same, whether
117 principal or income, in trust for him and thereafter at any time or
118 times distribute part or all to him or apply or distribute the same
119 for his benefit or account. When the discretion hereunder
120 terminates, whether by reason of the age, or condition or death of
121 such person or otherwise, the fiduciary shall distribute any
122 property retained in trust for such person hereunder to such
123 person, or to his guardian or conservator or to his estate, as the
124 case may be. This discretion shall not apply to any distribution to
125 which the surviving spouse of the testator or settlor making the
126 instrument is entitled either outright or under a trust or share
127 which qualifies for a marital deduction under applicable federal
128 tax laws, except that distributions may be made to or applied for
129 the benefit of the surviving spouse.

130 *Section 4.* The following discretion, which shall be known as
131 the “Massachusetts Statutory Principal Discretion,” may be
132 conferred by reference upon any fiduciary, and, unless otherwise
133 provided in the instrument by which it is conferred, the term
134 “primary beneficiary” in the statutory discretion shall mean each
135 person currently entitled under the instrument to a share of
136 income, or, if no person is currently entitled to income as of right or
137 for priority of consideration, each person to whom income may
138 currently be paid in the discretion of the fiduciary;

139 The fiduciary may at any time pay to or for the benefit of the

primary beneficiary, the spouse of the primary beneficiary and children of the primary beneficiary under the age of twenty-five years such amounts of the principal held for the benefit of the primary beneficiary as the fiduciary deems advisable, giving reasonable consideration to other resources available to the distributee, for the comfort, maintenance, support or benefit of the distributee. The fiduciary may at any time pay to or for the benefit of other issue of the primary beneficiary and spouses and surviving spouses of issue of the primary beneficiary such amounts of the principal as the fiduciary deems necessary, after use of other resources available to the distributee so far as practicable without undue hardship, for the comfort, maintenance and support of the distributee and consistent with the best interests of the primary beneficiary and a due regard for the interests of all persons affected. This discretion may be exercised even though the share of principal held for the primary beneficiary is thereby exhausted. The discretion to pay principal to or for the benefit of any person includes the discretion after his death to pay or reimburse his estate for expenses incurred prior to his death and for reasonable funeral and burial expenses. If continuation of a trust or share has become impractical, the fiduciary may terminate it by distribution of the primary beneficiary or primary beneficiaries of the trust or share.

Principal which in the exercise of the discretion is paid to or used for the benefit of any issue of the primary beneficiary or spouse or surviving spouse of such issue shall be charged against any share of income or principal thereafter existing for such person or for any ancestor or issue of such person or for the spouse or surviving spouse of such person, ancestor or issue, unless the fiduciary upon equitable considerations shall otherwise determine. While the spouse or surviving spouse of the testator or settlor is primary beneficiary of any trust or share which qualifies for a marital deduction under applicable federal tax laws, this discretion shall not apply to such trust or share except to permit the fiduciary to pay principal to or apply it for the benefit of such spouse or surviving spouse. This discretion shall not be exercised in favor of any person then serving as such fiduciary who is otherwise eligible for his maintenance or support nor in favor of his estate or his creditors or the creditors of his estate.

SECTION 2. The general laws are hereby amended by inserting after Chapter 201A the following chapter:

3 Chapter 201B — STATUTORY CUSTODIANSHIP TRUSTS

4 *Section 1. Transfers in Trust.*

5 An adult person may, during his lifetime, transfer any property
6 owned by him, in any manner otherwise consistent with law, to one
7 or more named persons designated, in substance, as
8 “Massachusetts Statutory Custodianship Trustee.” Such transfer
9 shall be sufficient to create a trust upon the terms set forth in this
10 chapter as it is in effect at the date of the transfer without any
11 further trust instrument or designation of terms and without
12 appointment or qualification by any court, and shall be complete
13 upon acceptance of the trust by the trustee or trustees manifested in
14 any form. The trustee or trustees shall serve without giving bond or
15 surety unless the transferor by written instrument, or the probate
16 court upon the application of any person interested in the estate of
17 the transferor and upon good cause shown, shall provide
18 otherwise. All transfers in trust under this chapter shall be
19 revocable by the transferor at any time he has legal capacity by a
20 writing signed by him and delivered to the person, or if more than
21 one to any person serving as trustee.

22 *Section 2. Rights, Powers and Duties of Trustees.*

23 During the life of the transferor the trustee or trustees shall apply
24 the income and principal, by payment to the transferor or by direct
25 expenditure, as may be necessary for the comfortable and suitable
26 maintenance and support of the transferor and his family in
27 accordance with the principles applicable to a conservator. Upon
28 the death of the transferor the remaining property shall be
29 delivered and paid over to the state of the transferor. With respect
30 to the property in the trust, except as modified in the instrument of
31 transfer, the trustee or trustees shall have the Massachusetts
32 Statutory Optional Fiduciary Powers under Chapter 184B and
33 such additional rights and powers as the transferor may provide by
34 written instrument. The trustee or trustees shall account at least
35 annually to the transferor or to his guardian or conservator, if any,
36 and after the death of the transferor to his executor or
37 administrator. In the event of the incompetency of the transferor
38 the trustee or trustees may apply to the probate court in the same
39 manner as a guardian or conservator for authority to deal with
40 property held in trust in any manner in which the court might
41 authorize a guardian or conservator to deal with property of the
42 transferor.

43 *Section 3. Successor Trustees.*

44 A trustee may resign by an instrument in writing delivered to the
45 transferor or to his guardian or conservator, if any. A trustee may
46 be removed by the transferor by an instrument in writing delivered
47 to the trustee to be removed. If there is more than one person
48 serving as trustee, a vacancy need not be filled, and until a
49 successor is appointed the remaining trustee or trustees may act
50 alone. In the event of a vacancy a successor trustee may be
51 appointed by the transferor, if legally competent, or as the
52 transferor shall have provided by written instrument, and
53 otherwise by his guardian or conservator, if any, and if none, by his
54 heirs presumptive, and such appointment shall become effective
55 upon acceptance.

1 SECTION 3. Section 1 of this act shall apply only to wills and
2 trust instruments executed after the effective date of this act.
3 Section 2 of this act shall apply only to transfers made after the
4 effective date of this act.

Note: This is an exact reproduction of the proposed bill. All spelling and grammar mistakes are found in the original.

Relation To The "Omnibus Probate Act" Of 1976

In 1976, the General Court enacted an omnibus probate statute making a number of changes in the probate laws of the Commonwealth. (Chapter 515 of the Acts of 1976). Massachusetts did not enact either the "Uniform Probate Code" or the "Uniform Trustee's Powers Act".

It would appear that the proponents of House bill 1648 are not satisfied with Chapter 515 of the Acts of 1976, which becomes effective in 1978, but want to add further features of the other rejected Uniform Act proposals.

Certain new, but limited, powers were in fact given to executors and administrators (and to temporary executors) by Section 12 of the new Massachusetts Omnibus Probate Act of 1976 as follows:

Section 12. Chapter 195 of the General Laws is hereby amended by inserting after section 5 the following section:

Section 5A. Except as restricted or otherwise provided for by the will or by order of the probate court, and in addition to other powers conferred by law, executors and administrators shall have the following powers:

(1) power to sell any personal property of the estate or any interest therein, for cash, credit or for part cash and part credit, and with or without security for unpaid balances;

(2) power to invest in prudent investments;

(3) power to distribute assets of the estate in kind or partly in cash and partly in kind and pro rata or not pro rata at then current values as between beneficiaries;

(4) power to effect a fair and reasonable compromise with any debtor, creditor, obligor or obligee.

Nothing in this act shall prevent an executor or administrator from obtaining specific authority from the Probate Courts to exercise the powers herein set forth.

As will be seen, the proposals of House bill 1648 go far beyond these enumerated powers in the new statute, and some may conflict with it.

A full set of fiduciary powers which may be incorporated by reference in a will or trust has been made a part of the statute law in Connecticut, North Carolina and Tennessee. Other states have provided some statutory fiduciary powers.

In Massachusetts, the proponents of the 1976 Omnibus Probate Act declined to include all of the various powers contained in Section 3-715 of the draft of the proposed Uniform Probate Code when the Omnibus Probate Act was progressing through the General Court.

No state seems to have adopted a statute authorizing "Statutory Disability Discretion", "Statutory Principal Discretion" or "Statutory Custodianship Trusts."

In order to demonstrate the changes this proposed legislation would effect in the present practice employed in the preparation of wills and trusts, we have set forth below a very abbreviated version of a will containing the provisions suggested by House bill 1648 which apply to wills.

Form of Will with Proposed "Short Form Clauses"

I, Thomas Testate, being of sound and disposing mind and memory do hereby make, publish and declare this to be my last will and testament.

FIRST: I direct my executor, hereinafter named, to pay all my just debts, expenses of administration and funeral expenses, as soon after my decease as may be possible.

SECOND: I give, devise and bequeath to the trustees hereinafter named such amount (if any be required) as will equal fifty percent (50%) of the value of my adjusted gross estate as defined in the In-

ternal Revenue Code in force on the date of this will, as finally determined for federal estate tax purposes, such fifty percent (50%) to be reduced by the aggregate value of all interests in property (if any) which pass or have passed from me to my said wife Thelma by any other provision of this will or otherwise, provided such interests qualify for the marital deduction.

My trustees shall pay the net income of said trust, at least quarterly, to my said wife Thelma, as long as she lives, and may, in their uncontrolled discretion, pay all or any part of the principal to my said wife during her lifetime.

Any principal and accumulated interest of said trust estate remaining at the time of the decease of my said wife shall be distributed as my said wife Thelma shall appoint by her will, and the said trust shall terminate.

THIRD: All the rest, residue, and remainder of my estate, I give, devise and bequeath to my son George. All federal and state estate taxes shall be payable out of the residue of my estate.

FOURTH: Any executor or trustee or other fiduciary acting under this will shall have the "Massachusetts Statutory Optional Fiduciary Powers."

FIFTH: Any executor or trustee or other fiduciary acting hereunder shall have the "Massachusetts Statutory Disability Discretion."

Sixth; any executor or trustee or other fiduciary acting hereunder shall have the "Massachusetts Statutory Principal Discretion." reunder shall have the "Massachusetts Statutory Principal Discretion."

SEVENTH: I nominate and appoint the Dependable Trust Bank as executor and trustee under this will, and also as temporary executor, if such temporary executor is advisable.

Witness my hand and seal this second day of May 19

Thomas Testate

While this model for a will has been much over-simplified, it probably contains the essential elements for a will which would divide the testator's probate estate between his wife and son. One is to note that the exact division is not quickly ascertainable because of the marital deduction factor involved.

The testator by reading the will could not understand what he was signing. The attorney drafting the will would be obliged to give a lengthy explanation and this might be done orally with few or no written notes to indicate the testator's understanding or intent.

This draft of a will includes all three of the short form clauses proposed by House bill 1648 of 1977 and it is necessary to discuss each of these short form provisions separately.

1. Massachusetts Statutory Optional Fiduciary Powers

Under present practice, the powers exercisable by executors and trustees under a will, other than those powers which are set forth in the statutes, are spelled out in detail in the instrument. Barring such a specific grant of authority in a will, an executor or trustee might be required to seek the approval of the Probate Court before an action was taken. Obviously, there is a settled body of law found in the decisions of the Supreme Judicial Court to which an executor or trustee can look for guidance, and there are various provisions in Chapters 195 to 199 and Chapters 202 to 206 of the General Laws which govern the executor and trustee (and other fiduciaries) in the discharge of their official duties. New provisions were effective in 1978.

While it is not proposed that the existing statutory scheme should be repealed outright, we must observe that to the extent that the proposed legislation conflicts with the existing framework of statute law and judicial decisions, there would be some problems.

The Prudent Man Rule

Over and above all other principles of law applicable to the fiduciary is the rule of *Harvard College v. Amory*, 26 Mass. [9 Pick.] 446, at 461 (1830), which is this:

All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion, and intelligence manage their own affairs, not in regd to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.

We might note that the rule applicable to trustees is well known to every lawyer and professional trustee and is one by the very nature of which there can be no liberalization.

The executor under the will must always act in good faith and with reasonable discretion and, more importantly, the executor always acts in accordance with the specific authority granted him in the will.

The Regulation of Trust Business

We would also take note of the provisions of General Laws Chapter 203, Sections 4A and 4B which regulate the activities of

banks and trust companies and other professional trustees. An important part of this Section 4B requires the professional trustee to furnish the customer with a written notice in clear and understandable language to the effect:

“(c) That the interests of the customer, his estate and the beneficiaries under any will or instrument creating a trust may at times be in conflict with the interests of the named fiduciary or fiduciaries.”

Subsection (b) of Chapter 203, Section 4B requires that the professional trustee must advise the customer that he should obtain and pay for independent counsel to “plan and draft any will, instrument creating a trust or other fiduciary document, including documents required by a probate court, and that the fiduciary may have such documents reviewed by counsel representing its interests.”

Impact of the Proposed Optional Fiduciary Powers

First and foremost, it is provided that the fiduciary (executor or trustee) shall have the statutory powers *without approval of any court*. This attempted divestiture of the control over fiduciaries by the Probate Courts of the Commonwealth is not in the public interest.

An example of the serious conflicts which arise under the first proposal is found in clause (e) of SECTION 1, subsection 2 of House bill 1648. Among other things, this clause (e) provides:

1. The fiduciary is not bound by the prudent man rule, or any other rule or restriction on investment of principal or income.
2. The trustee may invest in mutual funds, or in the common stock, bond or balanced pooled fund maintained by the trustee which would usually be a bank, a large law firm or institution with trust authority.

While it may well be, *in a given case*, both necessary and desirable to permit a particular executor and a trustee to retain as an investment some particular asset¹ which would not normally qualify as a fiduciary investment, it would be against sound public policy for Massachusetts to give free license to the trust business to abandon the rule of *Harvard College v. Amory*.

¹For example: Shares in a closely held family business.

We think it unwise to give a general unrestricted license to a professional trustee to invest in its own or someone else's mutual or pooled fund without notice to a beneficiary. The mandate of General Laws Chapter 203, Section 4B(g) makes it clear that a "customer" of the professional trustee is to be given a consumer-type "complete disclosure" if any part of the trust estate is to be invested in a pooled fund. This proposed statute would make this protective legislation enacted in 1973 almost a pious platitude.

There is no question but that the proposed statute is designed to protect the fiduciary, not the public. We can take note of the fact that the fiduciary business involves the payment by the public of substantial fees for administration and distribution and that such fees are more than adequate, in the normal case, to permit the professional trustee to operate deliberately, with prudence and with resort to a probate judge if a legal question of a substantial nature should arise.

Judicial Authority

The Supreme Judicial Court in *Briggs v. Crowley*, 352 Mass. 194 (1967), has said that "even very broad discretionary powers are to be exercised in accordance with fiduciary standards and with reasonable regard for usual fiduciary principles."

We hesitate to recommend anything inconsistent with this opinion.

In *Mazzola v. Myers*, 363 Mass. 625 (1973), there is a thorough discussion of the duties and obligations of testamentary trustees, especially with regard to the qualification of property for the marital deduction. In this case the court says:

"Powers granted to trustees, even very broad discretionary powers, are always subject to the control of a court of equity to assure that in the exercise of those powers, the purposes of the trust are fulfilled."

We would not lessen the impact of this decision in any way.

Finally, in *Old Colony Trust v. Silliman*, 352 Mass. 6 (1967), a case involving the allocation of principal and income, it was held by the Supreme Judicial Court, that even though the trust contained the following clause:

"My said trustee may decide whether accretions to the trust property shall be treated as principal or income and whether expenses shall be treated as principal or income. . . ."

the trustee bank was, in instances of doubt

“... to use its best informed judgment, in good faith in the light of what the established rules suggest to the trustee is consistent therewith. This is a means of avoiding the expense of litigation. This power may not be used to shift beneficial interests”

Because of decisions such as these here cited, we feel compelled to say that it is not advisable to set up statutory standards, except the most minimal ones, in an area where the true authority and final decision is to be made by the Probate Court in seeking out what in equity and good conscience ought to be done under all of the circumstances.

Under the proposed “Optional Fiduciary Powers,” the fiduciary would have the right to compromise estate tax matters “as the fiduciary may determine.” In these days of high taxation, this power alone is one which could lead to more litigation than it would prevent.

The final unnumbered paragraph in SECTION 1, subsection 2 of the bill (House bill 1648) (lines 89-103) contains language which is apparently designed to permit the fiduciary (usually the executor) to take full advantage of the marital deduction and the charitable deduction from the gross estate. This language is not intelligible to the general public.

We note that the proposed SECTION 1 (lines 99-100) takes some notice of fiduciary responsibility to the heirs and beneficiaries by including this sentence:

“Powers conferred on the fiduciary shall be exercised only in accordance with a reasonable discretion.”

We refrain from attempting here to adjudicate any controversy between a trustee and its beneficiaries but conclude that the mere existence of some “standard” or “optional” power in a will or trust will never justify the abandonment of fiduciary responsibility, good faith and prudence. Thus, the “standards” may be misleading and may cause people to forego their legal rights.

Tax Reform Act of 1976

Because we do not recommend this bill for other reasons, we do not here discuss the federal and state estate tax implications of it. In an article in the *Massachusetts Law Quarterly*, Fall, 1976, pages 143-148, prior to the enactment of the Tax Reform Act of

1976, the reasons which led to the sponsorship of House bill 1648 and reference to some tax aspects are set forth.

A comprehensive review of the Tax Reform Act of 1976 and the revised Massachusetts Estate Tax (General Laws Chapter 65C) would seem to be necessary as a condition precedent to any further consideration of House bill 1648.

We do not intend to convey the impression that we think the proposed clauses are necessarily inconsistent with state and federal tax law.

The Position of the Probate Courts

In the course of our study of this proposed legislation, we had an opportunity to submit the bill to the Administrative Committee of the Probate Courts. The Administrative Committee voted not to recommend House bill 1648 and stated the following reasons for its position:

- (1) The proposed bill attempts to confer a set of broad discretionary powers upon a fiduciary and yet, at the same time, apparently circumvents the power of the Probate Courts to inquire into the exercise of these powers.
- (2) Wills and trusts should be "tailor-made" to suit each individual testator or settlor, and the incorporation by reference of the enumerated fiduciary powers in the proposed bill would only cloud the testators' or settlors' understanding of what powers or duties they had conferred on the fiduciary.
- (3) Unskilled lawyers might adopt the short form clauses without fully appreciating their importance and, consequently, not fully disclosing the provisions to the client.⁵
- (4) Any suggestion that this proposed legislation was comparable in scope or effect to short form statutory Quitclaim or Warranty deeds was misplaced because of the complexity, scope and technicalities involved in House bill 1648 as compared with the uniform legal effect of the short form deeds prescribed by statute.

⁵It is true that the lawyer is supposed to "furnish to the testator or settlor copy" of the statutory clauses.

2. Massachusetts Statutory Disability Discretion

Subsection 3 of SECTION 1 of House bill 1648 is designed to permit a fiduciary to handle the situation where a beneficiary is either a minor, one not of a certain age, or one who has been determined *by the fiduciary* (not by the court) to be unable to properly care for his property because of advanced age, mental weakness or physical incapacity.

Under this statutory option, the trustee would be protected in making distributions to those in the classes above and there would be no need for guardianship or conservatorship.

Many instruments now are drafted with the stipulation that a fiduciary may make payments (distributions) “to or for the benefit” of the beneficiary. In other instruments there are detailed provisions to handle cases of disability or minority.

We see no reason to support this “Disability Discretion” especially in cases where a person might need a guardian or conservator to insure that the trustee was properly administering the estate. If a testator or trust grantor, after having been fully advised by independent counsel, wishes to endow his trustee with such discretion, it is a simple matter indeed and no blanket clause is necessary or even desirable.

3. Massachusetts Statutory Principal Discretion

Subsection 4 of SECTION 1 of House bill 1648 would make available a standard clause which, if incorporated in a will or trust, would give the trustee (normally) very wide discretion to distribute principal to the “primary beneficiary” (a person entitled to the income currently) or to the spouse or children of the primary beneficiary.

In many cases a trust or will, or otherwise, provides that a named person shall receive the income during life, or for a stated period of time. Such person, the primary income beneficiary, may or may not ever have any right to receive principal.

The language of this subsection 4 appears to reflect the opinion of the Supreme Judicial Court in *Woodberry v. Bunker*, 359 Mass. 239 (1971), where it was held that *if* a trustee was given a power to use part or parts of the principal “as in the opinion of my Trustee shall be needed for the comfortable support, medical, or nursing case, or other purposes which seem wise to my Trustees” such a

clause constituted a judicially enforceable standard (which should satisfy the Internal Revenue Service) and that it meant that the beneficiary is to be maintained (by using principal as well as available income) "in accordance with the standard of living which was normal for him before he became a beneficiary of the trust."

An optional statutory clause would not add to or alter the ability to include administrative powers or obligations of trustees in those wills and trusts which require provisions allowing for the use or distribution of principal, according to a standard, and at the trustee's discretion.

We do not think that every will or trust necessarily should have this sort of provision. We reached the conclusion that if the testator or settlor of a trust wishes to have the trustee given such a power to use principal, it would be far better for all concerned if it was spelled out in plain words in the instrument. The court has approved a broad standard in *Woodberry v. Bunker*, and, of course, a much more specific and detailed standard for the guidance of a trustee could be employed by the draftsman.

The Intent of the Testator

It has been said on countless occasions that the intention of a testator, or the intention of the creator of a trust, is something which is to be ascertained at the time of a judicial proceeding, by construing the instrument as a whole. One wonders how the true intent of anyone can be determined if a will or trust consists of a number of options, clauses, formulas and other material which is incorporated by reference. A judge could not be sure a testator really understood the effect of the document which was executed.

4. Statutory Custodianship Trusts

SECTION 2 of House bill 1648 proposes the creation of Statutory Custodianship Trusts.

It is said that the need for such "trusts" originates from the situation which arises when an agent, acting under a mere power of attorney, learns that the principal who has given such power of attorney has become incompetent. Under normal conditions, such a power of attorney terminates when the disability occurs and it is often necessary to arrange for the appointment of a guardian

(where there is mental illness) or a conservator, where there is physical or mental weakness.

Proponents of this section call attention to its similarity to the present procedure of the Uniform Gifts to Minors Act (General Laws Chapter 201A).

It is also said that one of the principal purposes of the proposed Custodianship Trust is to obviate the necessity of the appointment of a conservator or guardian for an elderly person who might become incompetent. One might ponder the question whether the principal, while competent, was following the methods and results employed by the "agent" during the period the Power of Attorney was in force, and if so, who will now be responsible for such oversight after a custodianship trust automatically comes into existence.

Many corporate fiduciaries have advertised agency arrangements, under a mere power of attorney, or custodianship accounts with no trust relationship. It would appear that one purpose of the "Custodianship Trust" is to retain such business in the event of incompetency of the customer.

In the case of a wealthy person who has one of these agency accounts, there is no reason why a provision transforming the arrangement into an automatic statutory trust (with optional trust authority and powers as already discussed) should be used.

A conservator might be necessary in order to do some estate planning, or it might well be more preferable to have a family member act as conservator or guardian.

We fail to see that the idea of Custodianship Trusts is beneficial to the public in general.

We must again state that there is nothing in the law which would prevent a person from establishing a trust relationship, arising out of an agency relationship, upon happening of some event (such as demonstrated incompetency) but we would not encourage the enactment of a statute which would obtain this result merely by incorporating the idea by reference.

We do not recommend House bill 1648.

**B. CUSTODY — STANDARDS IN CONTESTED
CHILD PLACEMENTS**

HOUSE (1977) No. 2018

**AN ACT PROVIDING FOR STANDARDS IN CONTESTED
CHILD PLACEMENTS.**

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Chapter 208 of the General Laws is hereby
2 amended by inserting, after section 7, the following section:—
3 *Section 7A.* Every libel for divorce shall state fully the names,
4 addresses and ages of all minor children of the parties, including
5 any natural, adoptive, or any other children residing with or
6 supported by the parties.

1 SECTION 2. Said chapter 208 is hereby further amended by
2 inserting, after section 16 the following sections:—
3 *Section 16A.* In any divorce proceeding in which there is a
4 dispute as to the custody of any child, the court may, upon
5 request of any party or upon the court's own motion, order the
6 family service officer of the court to investigate and file a written
7 report with the court concerning potential custody arrangements
8 for the child. Such investigation, the scope of which shall be
9 defined by the court's order, shall be completed as expeditiously
10 as possible. The family service officer may consult any person
11 who may have information about the child or such potential
12 arrangements. The court may assess the cost of the investigation
13 against either or both parents. Where the parents are indigent,
14 costs approved by the court shall be paid by the county where the
15 proceeding is held.

16 (b) The written report shall contain a recitation of facts and
17 observations concerning the child and his potential custody
18 arrangements and shall address itself specifically to those
19 elements enumerated for consideration in section twenty-eight A.
20 The report shall not include medical, psychological or psychiatric
21 assessments of the child or either parent unless:

22 (i) the family service officer is a qualified expert in the field; or
23 (ii) such assessment appears in the report solely as a summary
24 of a written evaluation of a qualified expert in the relevant field.
25 The written evaluation shall be signed by such expert or, if the
26 expert is unavailable, his supervisor, and appended to the body of
27 the report. The summary shall contain explanations of the
28 meaning of technical terms used in the evaluation.

29 The report shall not contain recommendations concerning the
30 disposition of the case. The report shall be used by the court as an
31 aid in making its determination. The family service officer shall
32 make available to all counsel of record the names and addresses
33 of all persons from whom information was obtained.

34 (c) Written reports filed pursuant to this section shall not be
35 public records. Upon request of counsel the court shall permit
36 counsel to examine the written report prior to the hearing under
37 such conditions as the court may impose.

38 *Section 16B.* In any proceeding for separate support, divorce
39 or modification of a prior custody order or decree, except those in
40 which an agreement providing for support, custody and visitation
41 of the child has been submitted and approved in its entirety by the
42 court according to the provisions of section twenty-eight A, the
43 court may, in its discretion appoint independent counsel to
44 represent the interests and guard the rights of the child. Said
45 counsel shall investigate the facts with the assistance of the family
46 service officer of the court. Said counsel, together with the family
47 service officer, shall inform the child, in a manner appropriate to
48 the child's ability to understand, of the content and meaning of
49 any court order or decree, any parental agreement, or any
50 substantial modification thereof. The compensation of said
51 counsel shall be fixed by the court and the court shall assess all
52 costs, fees and disbursements incurred as a result of his
53 appointment against either or both parents. Where the parents
54 are indigent, said costs, fees and disbursements shall be paid by
55 the county where the proceeding is held upon certificate by a
56 judge to the county treasurer.

1 SECTION 3. Section 19 of said chapter 208, as appearing in
2 the Tercentenary Edition, is hereby amended by striking out, in
3 line 4, the words "expedient and for their benefit" and inserting in
4 place thereof the words:— in their best interests, in accordance
5 with the provisions of section twenty-eight A.

1 SECTION 4. Said chapter 208 is hereby further amended by
2 striking section 28, as appearing in the Tercentenary Edition, and
3 inserting in place thereof the following sections:—

4 *Section 28A.* Where a dispute exists as to the custody of any
5 child, the court shall, upon a decree of divorce or an order issued
6 under section twenty A, or an order relative to the care, custody
7 and maintenance of minor children issued under section thirty-
8 two of chapter two hundred and nine, determine such custody in
9 accordance with the best interests of the child. In determining the
10 best interests of the child:

11 (a) maintenance of continuity in an environment that meets
12 the child's emotional and physical needs shall be considered to be
13 in the child's best interests, and

14 (b) the court shall consider the interaction and emotional
15 relationship of the child with his parent or parents, his siblings
16 and any other person who may significantly affect the child's
17 growth and development.

18 In making its determinations under this section, the court shall
19 consider all relevant evidence, including but not limited to:

20 (i) the preference of the child as to his custodian, whether
21 expressed directly or indirectly, if the court is satisfied that such
22 child's expression genuinely reflects his wishes;

23 (ii) the duration of the child's present and past living
24 arrangements and his inter-relationship with his school and
25 community;

26 (iii) the presence or absence of mental or physical conditions
27 that affect parental capacity to relate to and care for the child;
28 and

29 (iv) the likelihood that a particular custody arrangement
30 would jeopardize the child's physical health or impair his
31 emotional development.

32 The court shall not consider conduct of a proposed custodian
33 that does not affect the ability of such proposed custodian to care
34 for the child.

35 The court's determination of custody shall be accompanied by
36 the court's written opinion of the best interests of the child.

37 *Section 28B.* The court may, where appropriate to the child's
38 age and ability to understand, meet with the child in chambers to
39 acquaint itself with the child, and to ascertain, if possible, the
40 child's preference as to his custodian. The court shall permit the
41 child's counsel, if any, to be present at the meeting. Counsel for

42 either parent shall not be permitted to interview any child without
43 the presence of the child's counsel, if any, or the prior approval of
44 the court where there is no such counsel.

45 *Section 28C.* Where no dispute exists as to the custody of any
46 child, the parents may submit an agreement which contains
47 suitable provisions for custody, support, and visitation of the
48 child for review by the court. The agreement may provide for
49 joint legal custody with physical custody in either party. The
50 court may approve such agreement, in whole or in part, if it
51 determines that the child's best interests, as set forth in section
52 twenty-eight A, will be served thereby, and that the agreement
53 fulfills the requirements of section twenty-eight E and twenty-
54 eight G, or the court may request that the parties submit a revised
55 agreement. The court may meet with the child in chambers as
56 provided in section twenty-eight B before making its determina-
57 tion. Upon its approval of a parental agreement, the court shall
58 inform the child, in a manner appropriate to the child's ability to
59 understand, of the content and meaning of the agreement or any
60 substantial modification thereof.

61 *Section 28D.* If, after a hearing, the court makes either the
62 findings under paragraph (a) or the findings under paragraph (b),
63 it may, if the best interests of the child as provided in section
64 twenty-eight A so require, order custody awarded to a third
65 party:

66 (a) the child is suffering serious physical or emotional injury as
67 a result of parental abuse or neglect and the child cannot be
68 adequately protected by the provision of social services;

69 (b) (i) prior to the proceeding for divorce or separate support,
70 the child has been in custody of a person acting as a parent with
71 the consent of either natural or adoptive parent or by court order;
72 and

73 (ii) the child has been so successfully integrated into the family
74 of the person acting as parent that he looks to that custodian for
75 guidance, discipline, the necessities of life and parental love,
76 affection and comfort; and

77 (iii) the natural or adoptive parents have failed to maintain a
78 significant parent-to-child relationship with the child so situated;
79 and

80 (iv) a change of environment would be disruptive and would
81 jeopardize the child's physical health or significantly interfere
82 with his emotional well-being.

83 Custody may only be awarded to a third party under paragraph
84 (b) who is acting as a parent under subparagraphs (i) and (ii) of
85 paragraph (b).

86 *Section 28E.* (a) A parent not granted custody of the child is
87 entitled to such reasonable visitation as will enable the child and
88 the non-custodial parent to maintain a meaningful parent-
89 to-child relationship, unless the court finds, after a hearing, that
90 visitation by the parent would jeopardize the child's physical
91 health or seriously impair his emotional development. The court
92 shall consider the age of the child, the child's relationship to the
93 non-custodial parent prior to the commencement of the action,
94 and the proposed locations and circumstances of the visits in
95 determining what is reasonable visitation.

96 (b) The court may modify an order granting or denying
97 visitation rights whenever modification would serve the best
98 interests of the child. The court may restrict or deny visitation
99 rights if it finds that the visitation is likely to jeopardize the child's
100 physical health or seriously impair his emotional development. In
101 the absence of mitigating circumstances, a finding by the court
102 that the non-custodial parent has repeatedly failed to visit the
103 child may be deemed evidence of sufficient lack of interest in the
104 child to warrant the restriction of visitation rights on the grounds
105 that such conduct may seriously impair the child's emotional
106 development.

107 (c) The custodial parent or a third party designated by the
108 custodial parent shall have the child available for visitation by the
109 non-custodial parent at such times and places and in such manner
110 as the court directs. Unless otherwise ordered or agreed to, the
111 non-custodial parent shall be responsible for transportation and
112 other costs of the visits. Upon a finding of an unwarranted denial
113 or interference with duly ordered or agreed to visitations by the
114 custodial parent, the court may order counseling and conciliation
115 for both parents, may order counseling for the child, may appoint
116 a third party to ensure visitation is properly carried out, may
117 order substitute visits, and may fine either or both of the parents
118 in an amount not in excess of two hundred dollars. The court
119 shall assess fees, costs and disbursements incurred pursuant to
120 this subsection against either or both parents. Where the parties
121 are indigent, costs, fees and disbursements shall be paid by the
122 county where the proceeding is held upon certificate by a judge to
123 the county treasurer.

124 *Section 28F.* Either parent or a third party as next friend in
125 behalf of the child may file a motion for modification of a custody
126 order, decree or agreement.

127 (a) A party seeking a modification of a custody decree shall
128 submit, together with his moving papers, an affidavit setting forth
129 facts supporting the requested order for modification and shall
130 give notice together with a copy of his affidavit to other parties in
131 the proceeding, who may file opposing affidavits. The court shall
132 deny the motion unless it finds adequate cause for hearing the
133 motion is established by the affidavit, in which case it shall set a
134 date for a hearing on why the requested order or modification
135 should not be granted.

136 (b) The court shall not modify a prior custody decree so as to
137 change the established custodial environment of a child unless it
138 finds, upon the basis of facts or conditions that have arisen since
139 the prior decree or that were unknown to the court at the time of
140 the entry of the prior decree, that a substantial change has
141 occurred in the circumstances of the child or his custodian, or
142 that the modification is necessary to preserve the physical, mental
143 or emotional well-being of the child. In applying these standards,
144 the court shall retain the custody arrangement ordered pursuant
145 to section twenty-eight A or agreed to pursuant to section twenty-
146 eight C, unless:

147 (i) the custodian agrees to the modification;
148 (ii) the child has been integrated into the family of the
149 petitioner; or

150 (iii) the child's present environment jeopardizes his physical
151 health or significantly interferes with his emotional well-being
152 and the harm likely to be caused by a change in environment is
153 outweighed by the advantages of a change to the child.

154 Paragraph (b) of section twenty-eight E shall apply to
155 modification of visitation arrangements.

156 (c) No motion for the modification of the custody order,
157 decree or agreement shall be heard earlier than one year after
158 disposition of the original divorce decree or prior motion,
159 whether or not the prior motion was granted, unless the court
160 determines on the basis of affidavits, that there is reason to
161 believe that the child's present environment may jeopardize his
162 physical health or significantly interfere with his emotional well-
163 being.

164 (d) Fees and costs shall be assessed against a party seeking

165 modification if the court finds that the modification action is
166 vexatious and constitutes harassment.

167 *Section 28G.* (a) In a proceeding for a divorce the court may
168 order either or both parents to pay an amount reasonable and
169 necessary for child support without regard to marital misconduct,
170 after considering all relevant factors, including:

- 171 (i) the financial resources and needs of the child;
- 172 (ii) the financial resources and needs of the custodial parent;
- 173 (iii) the standard of living the child would have enjoyed had his
174 parents not divorced or separated;
- 175 (iv) the physical and emotional condition of the child and his
176 educational needs; and
- 177 (v) the financial resources and needs of the non-custodial
178 parent.

179 (b) For the purposes of this section, the attainment of the age
180 of majority shall not be conclusive of emancipation and financial
181 independence of the child. The court may determine that an order
182 continuing the obligation to support beyond the age of majority is
183 warranted by the needs and circumstances of the child. No order
184 may continue beyond the child's twenty-first birthday. In making
185 such a determination, the court shall consider all relevant factors
186 including but not limited to:

- 187 (i) the child's continued residence with a parent;
- 187 (ii) the continued exercise of control by the parent over the
189 child;
- 190 (iii) the child's attendance at an educational institution;
- 191 (iv) the financial resources and obligations of each parent; and
- 192 (v) the child's age.

193 The burden of establishing the status of emancipation and
194 financial independence by competent evidence shall be on the
195 party making such assertion.

196 (c) In case of a mentally or physically disadvantaged child,
197 if the court, after considering the factors set forth in subsection
198 (a) deems it appropriate, the court may order support to continue
199 beyond the age of majority. No order may continue beyond the
200 child's twenty-first birthday.

201 *Section 28H.* In making an order or decree relative to the
202 custody of a child pending a controversy between his parents, or
203 relative to their final custody, the rights of the parents shall, in the
204 absence of misconduct, be held to be equal, and in making a
205 determination as to the custody of any child, there shall be no

206 presumption relative to the parenting abilities of either party on
207 the basis of sex or employment.

1 SECTION 5. Section thirty-one of chapter two hundred and
2 eight of the General Laws is hereby repealed.

1 SECTION 6. Section thirty-two of chapter two hundred and
2 nine, as appearing in Section 44 of chapter 400 of the acts of 1975,
3 is hereby amended by inserting after the word “require.” in line 15
4 the following words:— Any order relative to the care, custody
5 and maintenance of minor children made under this section shall
6 be made in accordance with sections twenty-eight A through
7 twenty-eight H of chapter two hundred and eight.

1 SECTION 8. Chapter 215 of the General Laws is hereby
2 amended by inserting, after section 30A, the following section:—

3 *Section 30B.* (a) The probate court shall give priority to any
4 proceeding involving a genuine dispute over custody, in
5 connection with a libel for divorce or a petition for separate
6 support, upon the filing of affidavits signed by both parties and
7 their attorneys stating that an irreconcilable conflict exists as to
8 the custody of the child.

9 (b) If the court determines that a public hearing may be
10 detrimental to the child’s welfare, the court may exclude the
11 public from a custody hearing, but may admit any person who
12 has a direct and legitimate interest in the particular case or a
13 legitimate education or research interest in the work of the court.

1 SECTION 9. Section 56A of said chapter 215, as appearing in
2 the Tercentenary Edition, is hereby amended by striking out, in
3 line 6, the word “sixteen” and inserting in place thereof the
4 words:— sixteen and sixteen A.

Custody Matters

The position of the Judicial Council on House bill 2018 of 1977 is
as follows:

SECTION 1. Names of parties and children in divorce petitions.

We oppose this provision for the reason that no
legislation is necessary nor useful under existing
practice.

SECTION 2. Investigations and Reports prior to Child Custody adjudications and appointment of child advocates.

We oppose this provision for reasons hereinafter stated in this Report.

SECTION 3. Amending section 19 of Chapter 208 of the General Laws.

We recommend the enactment the substance of section 3 as set forth in House bill 2018.

SECTIONS 4-9. Child Custody and Related Matters

We oppose sections 4-9 inclusive for the reasons hereinafter stated in this Report.

Investigations and Reports

It is doubtful whether there is any proceeding in a court which is more volatile, more emotional and more demanding of the wisdom of Solomon than the child custody case.

SECTION 2 of the bill proposes that a family service officer shall, on request, make an investigation and report in every custody controversy.

In those Probate Courts which have family service officers, there is usually a long list of cases which might possibly benefit from an investigation under the present law. There is neither time, nor personnel, nor resources to conduct the idealistic kind of in depth investigation that seems to be required by this legislative proposal. It is also to be noted that the cost of such investigations, for those unable to pay, (and this includes a great percentage of cases) would be borne by the county where the case was pending. Such costs where justified should be borne by the Commonwealth in any event, since the costs of the judicial system should be borne by the Commonwealth.

The second part of SECTION 1 (lines 38-56) establishes another social service function which the sponsors of the bill assume will protect the child or children which are the subject of the custody controversy. By this proposal a judge could appoint an independent counsel to "represent the interests and guard the rights of the child."

The child's counsel, who is to be compensated with county funds in cases of indigency, would act in concert with the probate family service officer to explain the meaning of any court order or decree.

Again, this idealistic approach fails to take into consideration the realities of the judicial system, the time which is available for any given case, the personnel and the costs of this kind of social service.

The Judicial Council has previously commented upon legislation of this kind. In our 50th Report in 1974 at page 94 we said:

To recommend a child advocate lawyer in custody cases will mean, in most cases, that the public will be asked to pay the bill for the services and expenses of such advocates. If granted the right to represent the child as another party to the proceeding, the advocate must be given funds for investigation or the procedure is a disgraceful sham.

We cannot be blind to the realities of the overworked and underpaid public defenders who now seek valiantly (and not always successfully) to keep pace with the huge caseloads of criminal business with which they have to deal. We have no real assurance as to the present ability of a limited number of child advocate counsel to function adequately in protection cases under General Laws Chapter 110, sections 29 and 29A.

Possibly the kind of pilot program of child advocacy which we suggested in 1974 might be attempted with a federal grant, and on an experimental basis. The probate judge does not now lack power to appoint an investigator or a guardian-ad-litem in custody controversies.

For meaningful child advocacy before a court, and this is not the work of a social worker, the attorney must have adequate time to investigate and prepare the case and must be sufficiently knowledgeable about children and their development to determine what information is needed. The attorney for the child must have a realistic grasp of household economics, education, emotional disturbances, physical health, the tax laws, psychology and a host of other concerns. It is better to be selective in a pilot program than to be superficial and to hold out an empty promise of independent advocacy where there is no real capacity to furnish service.

Perhaps the parents of children who seek a divorce should be obliged to enter a counseling program such as that provided for those with an alcohol addiction problem who are arrested for driving under the influence. We cannot recommend what appears to be only an empty gesture in the existing state of things.

Correction in Chapter 208, Section 19

SECTION 3 of House bill 2018 is a proposal to amend Section 19 which now reads as follows:

§19. Custody of Children During Pendency.

The court may in like manner, upon application of either party or a next friend in behalf of the minor children of the parties, make such order relative to the care and custody of such children during the pendency of the action for divorce as it may consider *expedient and for their benefit*.

We agree with the proposed change to strike out “expedient and for their benefit” and insert in place thereof the words “in their best interests.” We recommend the following draft act.

1978 DRAFT ACT AN ACT PERTAINING TO CUSTODY OF CHILDREN PENDING DIVORCE

Be it enacted by the Senate and House of Representatives in General Court assembled and by the authority of the same, as follows:

SECTION 1. Section 19 of Chapter 208 as appearing in the Tercentenary Edition, is hereby amended by striking out, in line 4 the words “expedient and for their benefit” and inserting in place thereof the words: “in their best interests.”

Disputes as to Custody upon Divorce

SECTION 4 of House bill 2018 has three totally unacceptable features in the proposed Section 28A:

- (1) It divests the probate judge of a significant portion of his discretionary power to decide child custody disputes.
- (2) It substitutes for a judicial inquiry a collection of elastic concepts which are put forth as the basis on which the “best interests of the child” must be determined (along with “all relevant evidence”).
- (3) It is a breeding ground for endless pettifoggery, appeals and prolonged legal proceedings.

We do not have a perfect method of determining what in the last analysis is in the “best interests of the child.” We do have, and we do need, a judicial officer to make a decision, on the basis of the evidence available under the reality of the Probate Court system, as to what these interests might be.

It would not do to lose sight of the fact that the parents often differ, sometimes violently, as to custody questions. Parents often use children as pawns for insidious games which sometimes relate to financial concerns, to a desire for revenge or to an insecure emotional or mental condition on the part of one or both of the parents.

Out of the divorce morass, the bickering of the parents and the damaged emotions of the children, the probate judge is supposed to make a binding legal decision.

Interview of the Child

A proposed amendment to Chapter 208, that is Section 28A (lines 37 to 44 of the bill), would appear to permit the probate judge to confer with the child in chambers. We do not think that such authority depends on legislative permission. A conference in chambers, where desirable, is something which is within the discretion of the judge in the quest for truth and the just disposition of the matter.

We have already indicated that unless there is a willingness on the part of the General Court to make very substantial funds available, the concept of an attorney (at public expense) for the child in a divorce proceeding is an empty gesture.

If No Custody Dispute Exists

The provision of the bill (House bill 2018) designated "Section 28C" is a further constriction of the judicial discretion. It introduces the concept of "joint legal custody" by written agreement of the parents "with physical custody in either party." It then requires the court to subject the written agreement to a series of tests and standards (Sections 28A, 28E and 28G of this bill) which promise to turn many of the already emotion packed custody proceedings into nightmares.

The Nature of a Custody Judgment

In the analysis of this bill, both with regard to the sections immediately under consideration and with regard to the bill as a whole, it would appear that the intent of the proponents is to establish what we presume are thought to be appropriate standards to be used in the decision making process which leads to the ultimate entry of a judgment of the court awarding custody.

Some of these standards are interests. For example, if the court

finds in a given case that a child has been living with foster parents, or a third party, and:

. . . the child has been *so* successfully integrated into the family of the person acting as parent that he looks to that custodian for *guidance, discipline*, the necessities of life and parental *love* and the natural or adoptive parents have *failed* to maintain a *significant* parent-to-child relationship with the child so situated and a change of environment would be *disruptive* and would *jeopardize* the child's physical health or *significantly* interfere with his *emotional well being*

custody could be taken away from the natural or adoptive parents and awarded to a third party, thereby terminating the parental rights.

Each of the words in italics in the above extract from the bill is sufficient to trigger a bitter legal dispute and require the court to hear evidence in depth on the particular points, to make findings on those points and to be sure that the evidence is in the record, that it supports the findings and justifies the ultimate judgment.

If counsel for the father disputes even the word "so" in the above extract, or the quality of the "guidance, discipline" or "parental love," or whether or not a relation was "significant," or whether something was "disruptive" the proceedings could be extended, appeals could follow and the failure of the judge to follow the exact language of the wonderfully proposed statute would be cited as the reason.

. Analogy to the Alimony Statute

Section 34 of Chapter 208 of the General Laws was most recently amended in 1975 so that it now reads as follows:

§34.

Upon a divorce or upon motion in an action at any time after a divorce, the court may make a judgment for either of the parties to pay alimony to the other. In addition to or in lieu of a judgment to pay alimony, the court may assign to either the husband or wife all or any part of the estate of the other. In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be assigned, the court, after hearing the witnesses, if any, of each party, shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates.

The effect of this statute as amended is interesting. In *Bianco v. Bianco*, 1976 A.S. 2702, the Supreme Judicial Court declared that the power of the probate judge to make fair and just assignment of the spouses property in a divorce action must be exercised with due regard to the various tests or standards found in the statute. The issue here is, of course, money, and in the event of a contest, counsel for the parties can be expected to use great ingenuity to sustain their respective positions. While not all cases will be appealed, if it should be made to appear from the opinion of the judge, or from the nature of his decision, that he may not have considered the element of "vocational skills" of the wife, or "conduct of the parties during the marriage" or other tests in the statute, there is a basis for appeal. In most cases there is no record of evidence.

The Supreme Judicial Court has said that "the record must show beyond doubt that the judge considered all the factors set forth by the statute."

In the case of *Putnam v. Putnam*, 1977 A.A.S. 16, the Appeals Court held that the report of the probate judge did not furnish a basis for the judgment on the alimony question and the case had to be sent back so that a record could be made indicating not only that the judge considered the various tests, but that there was evidence (facts) upon which findings could be made.

In other cases which have reached the Appeals Court, it was alleged that the judge did not consider all the tests of the statute but in these cases there was no transcript or summary of the evidence which made it impossible for the Appellate Court to make any decision at all.

Some cases do not show the tests were applied; other cases might give an indication or a recitation that the statutory tests were considered but there may be no showing in them that evidence was presented on these matters.

Statutes such as Chapter 208, Section 34 add to the burden of the courts but more than this, they add to the length of time required to deal with each case. This, in turn, clogs the courts and creates backlogs and spurs a cry for "judicial reform."

We do not take the position that a probate judge should not consider various relevant factors (such as those found in Section 34 of Chapter 208) in making his legal judgment. We say that such close regimentation is inappropriate and has several undesired side effects. Probate judges might well benefit from additional seminars

dealing with the various aspects of their regular business, but the judicial decision should be arrived at independent of a complicated set of tests or standards which are subject to different interpretations by different people.

With the experience which has been gained with respect to the alimony statute, we cannot recommend that an even more ritualistic and complicated set of tests must be applied to the custody decision as if it were some sort of exact scientific experiment which would always end in a "correct" result if the right buttons were pushed, and the proper chemicals were mixed in correct quantities.

Conclusion

It comes to this. After listening to the parents, the lawyers, the social workers, the psychologists, the neighbors and even the confused young people, a judge has to make a decision as to what that judge, on the basis of independent judgment, thinks "is in the best interests of the child."

We must preserve this judicial decision making process and we must not engraft the kind of strangulation that is called for in this bill.

Much of what is in this proposed legislation is completely unnecessary, as it is already clear from many decisions of the Supreme Judicial Court that the probate judge has inherent powers to deal effectively with child custody cases.

It can hardly be argued that the litany of proposed custody tests is objective. The proposal, at best, sets forth a schedule of matters which are in the realm of mere speculation and opinion.

To enact this bill would be a serious mistake.

III. CRIMINAL LAW AND PROCEDURE
A. PORTRAYAL OF CRUELTY TO ANIMALS

HOUSE (1977) No. 2006

AN ACT TO DISCOURAGE CRUELTY TO ANIMALS IN THE
PRODUCTION OF COMMERCIAL VISUAL ENTERTAIN-
MENT MATERIALS.

*Be it enacted by the Senate and House of Representatives in
General Court assembled, and by the authority of the same, as
follows:*

- 1 SECTION 1. For the purpose of this act:
- 2 a. "Commercial Visual Entertainment Material" (CVEM) shall
- 3 mean any motion picture film, videotape, live television
- 4 broadcast or other means of projecting moving visual images
- 5 prepared for the purpose of making a profit. CVEM shall not
- 6 include documentary material. "Documentary material" is any
- 7 motion picture film, videotape, live television broadcast, or other
- 8 means of projecting moving visual images which depict natural
- 9 conditions as they occur, without staging for the purpose of
- 10 filming.
- 11 b. "Distributor" shall mean any natural person, corporation,
- 12 or other legal entity, engaged in the sale or lease of CVEM for the
- 13 purpose of making a profit.
- 14 c. "Exhibitor" shall mean any natural person, corporation, or
- 15 other legal entity, who displays, broadcasts, or causes to be
- 16 displayed or broadcast, any CVEM for purpose of making a
- 17 profit.
- 18 d. "Animal" shall mean all vertebrates, excluding man.

- 1 SECTION 2. The attorney general, or any organization for
- 2 the protection of animals incorporated under the laws of this
- 3 Commonwealth, may maintain an action under the provisions of
- 4 this act in the Superior Court for the county wherein the alleged
- 5 violation of this act occurred, or wherein the defendant is located,
- 6 resides, or conducts business. A distributor shall be considered to
- 7 have conducted business in any locality wherein CVEM
- 8 distributed by him is exhibited.

1 SECTION 3. It shall be a violation of this act for any
2 distributor or exhibitor to sell, lease, display or broadcast, or
3 cause to be sold, leased, displayed or broadcast, any CVEM
4 filmed, taped, or broadcast after January 1, 1978 which:

5 a. Contains any effects or scenes created by the use of any
6 contrivance, apparatus, or by any other means, which results, or
7 creates a substantial danger of resulting, in such cruel and abusive
8 treatment of an animal that, had the effect or scene been created
9 by such means in the Commonwealth, it would have constituted a
10 violation of any law of the Commonwealth concerning the
11 protection of animals. Such contrivances shall include but not be
12 limited to any mechanism designed to trip an animal.

13 b. Contains any effects or scenes created by the killing of an
14 animal.

1 SECTION 4. In any action brought under the provisions of
2 this act the plaintiff has the initial burden of demonstrating that
3 upon viewing the film, tape or broadcast a reasonable man could
4 believe that the effect complained of was created in a manner
5 prohibited by this act. If plaintiff meets this initial burden,
6 defendant incurs the burden of producing evidence concerning
7 the techniques employed in creating the effect. Defendant may
8 meet this burden by producing a signed, sworn affidavit from the
9 person or persons responsible for creating the effect, detailing the
10 techniques used. If defendant meets his burden, plaintiff has the
11 ultimate burden of establishing by a preponderance of the
12 evidence that the complained of exhibition or distribution was in
13 violation of the provisions of this act.

1 SECTION 5. Any party entitled to bring an action under the
2 provisions of this act may request injunctive or declaratory relief.
3 Pending final determination of the action a preliminary
4 injunction may be granted against exhibition or distribution of
5 the subject CVEM, but such preliminary injunction may be issued
6 only after notice and an opportunity to be heard are afforded the
7 defendant. To obtain a preliminary injunction plaintiff must
8 allege that the subject CVEM is either currently or will in the
9 immediate future be exhibited or distributed in the Com-
10 monwealth, and it must appear that the plaintiff has a substantial
11 likelihood of prevailing on the merits of his claim. •

1 SECTION 6. Any contract for the exhibition or distribution
2 of any CVEM found to contain visual effects prohibited by this
3 act shall be unenforceable by any party to such contract.

House bill 2006 is identical to House bill 1587 of 1976 which was investigated by the Judicial Council in that year. In our 52nd Report of 1976, at 128, the Council set forth the reasons why we were “constrained to oppose its enactment.”

House bill 2006 seeks to prevent the selling, leasing, or exhibition of films, video tapes, broadcasts or other means of projecting visual effects that portray cruelty to animals. The validity of such a statute depends upon the preservation of public morals which the “commission of cruel and barbarous acts [upon animals] tends to corrupt.” *Commonwealth v. Turner*, 145 Mass. 296, 14 N.E. 130 (1887). House bill 2006 prohibits only visual entertainment that portrays the actual cruelty, abusive treatment or death to animals or situations which create a substantial danger of these results. Such a prohibition does not include special cinematographic effects which, although not resulting in actual cruelty or death to animals, certainly appear realistic to the viewer.

Thus, the Council concluded, “why should we not be as alarmed by the realistic portrayal of animal suffering which results from harmless techniques as by those scenes which result in actual harm to the animals?” Therefore, to be valid, a bill prohibiting the portrayal of cruelty to animals in visual entertainment must encompass simulated, as well as actual, cruelty to animals.

The Judicial Council opposes House bill 2006 on additional grounds as well. Specifically, we are concerned by section 1(d) of the bill which expressly excludes humans from its protection. We believe this exclusion to be inappropriate. Indeed, “at a time when violence to humans pervades all forms of visual entertainment” a bill such as House bill 2006 should seek to protect humans as well as animals. As a result of this shortcoming, we find the bill to be inadequate.

Notwithstanding the above criticisms, the Judicial Council believes that the enactment of House bill 2006 would pose serious problems of enforcement. Section 3(a) of the bill contains the phrase “had the effect or scene been created by such means in the Commonwealth.” Such language indicates that the bill is designed to protect against scenes portraying cruelty to animals which were created outside Massachusetts being presented or distributed within

our jurisdiction. Consequently, the statute would be very difficult to enforce. In prosecuting violations of this statute, the initial problem would be obtaining jurisdiction over a foreign defendant. This could be a very time consuming and, in some cases, futile process.

Yet, even if jurisdiction over the defendant is obtained, the burden of proof requirements of section 4 of the bill present additional obstacles. Under section 4, the plaintiff has the initial burden of showing that a reasonable person, upon viewing the presentation, could believe that the scene or effect in question was prohibited by this bill. Obviously, this is a very light burden which could be easily satisfied. The defendant would then be required to rebut this assertion by producing evidence concerning the techniques employed in creating the effect. Once these preliminary steps are satisfied, the ultimate burden would be on the plaintiff, who would be either the Attorney General or the Massachusetts Society for the Prevention of Cruelty to Animals, to prove by a preponderance of the evidence that a violation of this act did occur. This burden would be extremely difficult to overcome with an out-of-state defendant. With a great percentage of filming being done either on the west coast or "on location" throughout the world, the time and expense which would be involved in gathering evidence, producing witnesses and similar pre-trial procedures would be tremendous, if not prohibitive.

As noted in the 52nd Report, "the sentiment of this bill is admirable." However, for the reasons discussed above, the Judicial Council finds House bill 2006 deficient and opposes its enactment.

IV. PROPERTY

A. EMINENT DOMAIN — UNIFORM EMINENT DOMAIN CODE

HOUSE (1977) No. 3752

AN ACT ESTABLISHING A UNIFORM EMINENT DOMAIN CODE

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

2 GENERAL PROVISIONS AND DEFINITIONS

3 *Sec.*

4 *101. Short Title.*

5 *102. Scope of the Code.*

6 *103. Definitions.*

7 *104. Agreement on Compensation and Other Relief.*

8 *105. Compliance with Federal Requirements.*

9 *Section 101. Short Title.*

10 This Act may be cited as the “Uniform Eminent Domain
11 Code.”

12 *Section 102. Scope of the Code.*

13 (a) This Code provides standards for the acquisition of
14 property by condemnors, the conduct of condemnation actions,
15 and the determination of just compensation. It does not confer
16 the power of eminent domain, and does not prescribe or restrict
17 the purposes for which or the persons by whom that power may
18 be exercised.

19 (b) This Code supplements the law of this state relating to the
20 acquisition of property and to the exercise of the power of
21 eminent domain. In the event of conflict between this Code and
22 any other law with respect to any subject governed by this Code,
23 this Code prevails.

24 *Section 103. Definitions.*

25 As used in this Act:

26 (1) “action” means condemnation action;

27 (2) “appraisal” means an opinion as to the value of or
28 compensation payable for property, prepared by or under the
29 direction of an individual qualified by knowledge, skill,
30 experience, training, or education to express an opinion as to the
31 value of property;

32 (3) “business” means a lawful activity, whether or not for
33 profit, other than a farm operation, conducted primarily for the
34 purchase, sale, lease, rental, manufacture, processing, or
35 marketing of products, commodities, or other property, or for
36 providing services;

37 (4) “condemn” means to take property under the power of
38 eminent domain;

39 (5) “condemnation action” includes all acts incident to the
40 process of condemning property after commencement of suit;

41 (6) “condemnee” means a person who has or claims an interest

in property that is the subject of a prospective or pending condemnation action;

(7) "condemnor" means a person empowered to condemn;

(8) "costs" means the reasonable fees, charges and expenses necessarily incurred in an action, including the fees and charges of expert witnesses, the cost of transporting the court and jury to view the premises, and other recoverable costs;

(9) "court" means a [] court of this state, and includes, when the context requires any [judge] [justice] of the court;

(10) "crops" means any form of vegetation intended to be removed and used or sold for commercial purposes, including grass, flowers, fruits, vegetables, trees, vines, and nursery stock;

(11) "farm operation" means any activity conducted primarily for the production of one or more agricultural products or commodities, including timber, for sale or home use, and customarily producing those products or commodities in sufficient quantity to be capable of contributing materially to the operator's support;

(12) "improvement" includes any building or structure, and any facility, machinery, or equipment that cannot be removed from the real property on which it is situated without substantial damage to the real property or other substantial economic loss;

(13) "lien" means a security interest in property arising from contract, mortgage, deed or trust, statute, common law, equity, or creditor action;

(14) "litigation expenses" means the sum of the costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, necessary to prepare for anticipated or participation in actual court proceedings;

(15) "local public entity" means a public entity other than the State;

(16) "person" includes a natural individual, partnership, corporation, association, other legal or fiduciary entity, and a public entity;

(17) "person property" means any property other than real property;

(18) "property" means an interest in real or personal property under the law of this State;

(19) "real property" means land and any improvements upon or connected with land; and includes an easement, servitude, or

other interest therein; and
(20) “work” includes construction, alteration, repair; remodeling, excavation, demolition, rehabilitation, relocation and landscaping.

Section 104. Agreement on Compensation and Other Relief.

At any time before or after commencement of an action, the parties may agree to and carry out according to its terms a compromise or settlement as to any matter, including all or any part of the compensation or other relief.

Section 105. Compliance with Federal Requirements.

Notwithstanding any provision of this Code, a condemnor may comply with any federal statute, regulation, or policy prescribing a condition precedent to the availability or payment of federal financial assistance for any program or project which the condemnor is authorized to exercise the power of eminent domain.

ARTICLE II

POLICIES GOVERNING LAND ACQUISITION

Sec.

- 201. Application of Article.*
- 202. Negotiation and Appraisal.*
- 203. Offer to Purchase at Full Appraised Value.*
- 204. Payment or Deposit Before Surrender of Possession.*
- 205. Notice to Terminate Occupancy.*
- 206. Rental Basis for Continued Occupancy.*
- 207. Coercive Action Forbidden.*
- 208. Offer to Acquire Uneconomic Remnant.*
- 209. Acquisition of Improvements to be Removed.*
- 210. Compensation for Tenant-Owned Buildings and Structures.*
- 211. Expenses Incidental to Transfer of Title.*
- 212. Waiver.*
- 213. Takings Without Condemnation Action.*
- 214. Interpretation and Effect of Article.*

Section 201. Application of Article.

(a) In order to encourage and expedite the acquisition of property by agreement, to avoid litigation and relieve congestion in the courts, to assure consistent treatment of owners, and to

promote public confidence in practices and procedures relating to the acquisition of property for public use, a condemnor, when acquiring property, shall comply with applicable provisions of Sections 202 through 211.

(b) Sections 202 through 211 apply to the purchase and acquisition of materials, supplies, equipment, or other personal property only if the condemnor determines to exercise its power of eminent domain with respect to that property.

Section 202. Negotiation and Appraisal.

(a) A condemnor shall make every reasonable and diligent effort to acquire property by negotiation.

(b) Before initiating negotiations, the condemnor shall cause the property to be appraised to determine the amount that would constitute just compensation for its taking. The owner or his representatives shall be given a reasonable opportunity to accompany the appraiser during his inspection of the property.

Section 203. Offer to Purchase at Full Appraisal Value.

(a) Before initiating negotiations for the purchase of property, the condemnor shall establish an amount which it believes to be just compensation therefor and promptly shall submit to the owner an offer to acquire the property for the full amount so established. The amount shall not be less than the condemnor's approved appraisal of just compensation for the property.

(b) In establishing the amount believed to be just compensation, the condemnor shall disregard any decrease or increase in the fair market value of the property caused by the project for which the property is to be acquired or by the reasonable likelihood that the property will be acquired for that project, other than a decrease due to physical deterioration within the reasonable control of the owner.

(c) The condemnor shall provide the owner of the property with a written appraisal, if one has been prepared, or if one has not been prepared, with a written statement and summary, showing the basis for the amount it established as just compensation for the property. If appropriate, the compensation for the property to be acquired and for the damages to remaining property shall be separately stated.

Section 204. Payment or Deposit Before Surrender of Possession.

An owner shall not be required to surrender possession of

161 property before the condemnor:

162 (1) pays the agreed purchase price;

163 (2) pays, or deposits for the benefit of the owner in accordance
164 with this Code, not less than the amount established as just
165 compensation for the property as shown by an appraisal
166 approved by the condemnor or the amount required by the court
167 under Section 603; or

168 (3) pays, or deposits in accordance with this Code, the amount
169 awarded by the judgment in the condemnation action.

170 *Section 205. Notice to Terminate Occupancy.*

171 Except in an emergency, a condemnor may not require a
172 person lawfully occupying property to move from a dwelling, nor
173 to move his business or farm operation, unless he has received
174 written notice from the condemnor at least 90 days before the
175 date by which the move is required.

176 *Section 206. Rental Basis for Continued Occupancy.*

177 If a condemnor, after acquiring property, rents all or part of
178 the property to the former owner or tenant for a short term or for
179 a period subject to termination by the condemnor on short notice,
180 the amount of rent charged may not exceed the lower of (1) the
181 fairly prorated rent, payable under the terms of the tenant's
182 immediately preceding unexpired lease, if any, or (2) the fair
183 rental value of the property to a short-term occupant.

184 *Section 207. Coercive Action Forbidden.*

185 In order to compel an agreement on the price to be paid for the
186 property, a condemnor may not advance the time of condemna-
187 tion, defer negotiations or condemnation and the deposit of funds
188 in court for the use of the owner, nor take any other
189 action coercive in nature.

190 *Section 208. Offer to Acquire Uneconomic Remnant.*

191 (a) If the acquisition of only part of a property would leave its
192 owner with an uneconomic remnant, the condemnor shall offer to
193 acquire the remnant concurrently and may acquire it by purchase
194 or by condemnation if the owner consents.

195 (b) "Uneconomic remnant" as used in this section means a
196 remainder following a partial taking of property, of such size,
197 shape, or condition as to be of little value or that gives rise to a
198 substantial risk that the condemnor will be required to pay in
199 compensation for the part taken an amount substantially
200 equivalent to the amount that would be required to be paid if it
201 and the remainder were taken as a whole.

202 *Section 209. Acquisition of Improvements to be Removed.*

203 A condemnor that acquires any interest in real property shall
204 also acquire at least an equal interest in all buildings, structures,
205 or other improvements located upon the real property acquired,
206 which the condemnor requires to be destroyed or removed or
207 which will be adversely effected by the use to which the real
208 property will be put.

209 *Section 210. Compensation for Tenant-Owned Buildings and*
210 *Structures.*

211 (a) If a building structure, or other improvement to be acquired
212 by a condemnor under Section 209 is owned by a tenant,

213 (1) it shall be deemed for the purpose of determining
214 compensation to be a part of the real property to be acquired
215 notwithstanding the right or obligation of the tenant, as against
216 the owner of any other interest in the real property, to remove it
217 at the expiration of his term; and

218 (2) the compensation awarded shall include an amount
219 sufficient to pay the tenant the larger of (i) the enhancement to
220 the fair market value of the real property contributed by the
221 improvement, or (ii) the fair market value of the improvement
222 assuming its removal from the real property.

223 (b) Payment under this section shall not duplicate any
224 payment authorized by law, and may be made only if the owner
225 of the real property disclaims any interest in the improvement. In
226 consideration for the payment, the tenant shall assign, transfer,
227 and release to the condemnor all of his interest in the
228 improvement.

229 (c) This section does not deprive the tenant of any right to
230 reject payment hereunder and to seek to obtain payment for his
231 interest in or damage to the improvement under any other law.

232 *Section 211. Expenses Incidental to Transfer of Title.*

233 (a) As soon as practicable after payment of the purchase price,
234 or payment of or deposit in court of funds to satisfy the judgment
235 in a condemnation action, whichever is earlier, the condemnor
236 shall pay, or reimburse the owner for, any reasonable
237 and necessarily incurred expenses for:

238 (1) recording fees, transfer taxes, and similar expenses
239 incidental to conveying the property to the condemnor;

240 (2) penalty costs for prepayment of any debt secured by a
241 preexisting lien, entered into or created in good faith, en-

242 cumbering the property; and

243 (3) the prorated portion of property taxes allocable to a period
244 after the date of vesting of title in, or the effective date of
245 possession of the property by, the condemnor, whichever is
246 earlier.

247 (b) The condemnor shall pay the owner interest at the annual
248 rate of [6] percent upon any part of the amount required by
249 subsection (a) that is not paid within 60 days after the owner has
250 made written demand for payment.

251 *Section 212. Waiver.*

252 If not inconsistent with the requirements of an applicable
253 statute or regulation, a failure to satisfy the requirements or
254 limitations imposed under Sections 201 through 211, inclusive:

255 (1) is waived by the failure of the property owner, in the
256 exercise of reasonable diligence, to object to or seek relief based
257 upon noncompliance; and

258 (2) may be waived by written agreement between the property
259 owner and the condemnor.

260 *Section 213. Takings Without Condemnation Action.*

261 (a) If property is to be acquired by a condemnor through the
262 exercise of its power of eminent domain, the condemnor shall
263 commence a condemnation action for that purpose. A condem-
264 nor shall not intentionally make it necessary for an owner of
265 property to commence an action, including an action in inverse
266 condemnation, to prove the fact of the taking [or damaging] of
267 his property.

268 (b) The judgment and any settlement in an inverse condem-
269 nation action awarding or allowing compensation to the plaintiff
270 for the taking [or damaging] of property by a condemnor
271 shall include the plaintiff's litigation expenses.

272 *Section 214. Interpretation and Effect of Article.*

273 (a) A failure to satisfy the requirements or limitations of
274 Sections 201 through 213 does not affect the validity of the
275 condemnor's interest in any property which it acquires by
276 purchase or condemnation.

277 (b) This Article shall be construed to be inconsistent with the
278 requirements of federal law governing financial assistance for any
279 project or purpose.

280

ARTICLE III

281

PROCEEDINGS BEFORE ACTION

282

Sec.

283

301. Entry for Suitability Studies.

284

302. Court Order Permitting Entry.

285

303. Deposit of Probable Compensation.

286

304. Modification of Court Order.

287

305. Recovery of Damages, Costs, and Expenses.

288

306. Preliminary Efforts to Purchase.

289

307. Scope of Efforts to Purchase.

290

308. Purchase Efforts Waived or Excused.

291

309. Condemnation Authorization.

292

310. Contents of Authorization.

293

311. Effect of Condemnation Authorization.

294

Section 301. Entry for Suitability Studies.

295

(a) A condemnor and its agents and employees may enter upon real property and make surveys, examinations, photographs, tests, soundings, borings, and samplings, or engage in other activities for the purpose of appraising the property or determining whether it is suitable and within the power of the condemnor to take for public use, if the entry is:

301

(1) preceded by reasonable efforts to notify the owner, and any other person known to be in actual physical occupancy of the property, of the time, purpose, and scope of the planned entry and activities;

305

(2) undertaken during reasonable daylight hours;

306

(3) accomplished peaceably and without inflicting substantial injury; and

307

(4) not in violation of any other statute.

308

(b) The entry and activities authorized by this section do not constitute a trespass, but the condemnor is liable under Section 305 for resulting damages.

311

Section 302. Court Order Permitting Entry.

312

(a) If reasonable efforts to accomplish a lawful entry or to perform authorized activities upon real property under Section 301 have been obstructed or denied or would be futile, the condemnor may apply to the court [in the county where the property or any part is located] for an order permitting entry.

316

(b) Unless after notice good cause to the contrary is shown, the court shall make its order permitting and describing the purpose

317

320 of the entry and setting forth the nature and scope of activities the
321 court determines are reasonably necessary and authorized to be
322 made upon the property. In addition to requiring a deposit under
323 Section 303, the order may include terms and conditions with
324 respect to the time, place, and manner of entry and authorized
325 activities upon the property which will facilitate the purpose of
326 the entry and minimize damage, hardship, and burden.

327 *Section 303. Deposit of Probable Compensation.*

328 (a) An order permitting entry under Section 302 shall include a
329 determination by the court of the probable amount that will fairly
330 compensate the owner and any other person in lawful possession
331 or physical occupancy of the property for damages for physical
332 injury to the property, and for substantial interference with its
333 possession or use, found likely to be caused by the entry and
334 activities authorized by the order, and shall require the
335 condemnor to deposit that amount with the court before entry.

336 (b) Unless sooner disbursed by court order, the amount
337 deposited shall be retained on deposit for [six months] following
338 termination of the entry. The court for good cause may extend
339 the period of retention.

340 *Section 304. Modification of Court Order.*

341 (a) After notice and hearing, the court may modify an order
342 made under Section 302.

343 (b) If a deposit is required or the amount required to be
344 deposited is increased by an order of modification, the court shall
345 specify the time within which the required amount must be
346 deposited, and may direct that any further entry or specified
347 activities or studies under the order as modified be stayed until
348 the required deposit has been made.

349 *Section 305. Recovery of Damages, Cost, and Expenses.*

350 (a) A condemnor is liable for physical injury to, and for
351 substantial interference with possession or use of, property
352 caused by his entry and activities upon the property. This liability
353 may be enforced in a civil action against the condemnor or by
354 application to the court in the circumstances provided by
355 subsection (c). [A notice of claim is not a prerequisite to the
356 action or motion.]

357 (b) In an action or other proceeding for recovery of damages
358 under this section, the prevailing claimant shall be allowed his
359 costs. In addition, the court shall award the claimant his
360 litigation, expenses incurred in any proceeding under Section 302

361 or 304 if it finds that the condemnor:

362 (1) entered the property unlawfully;

363 (2) entered the property lawfully but thereafter engaged in
364 activities upon the property that were abusive or lacking in due
365 regard for the interests of the owner or occupant; or

366 (3) failed substantially to comply with, or wrongfully exceeded
367 or abused the authority of, an order made under Section 302 or
368 304.

369 (c) If funds are on deposit under Section 303 or 304, the owner
370 or other person entitled to damages under subsection (a) may
371 apply to the court for an award of the amount he is entitled to
372 recover. The court shall determine the amount and award it to the
373 person entitled thereto and direct that its payment be made out of
374 the money on deposit. If the amount on deposit is insufficient to
375 pay the full amount, the court shall enter judgment against the
376 condemnor for the unpaid portion.

377 *Section 306. Preliminary Efforts to Purchase.*

378 (a) Except as provided in Section 308, an action to condemn
379 property may not be maintained over timely objection by the
380 owner unless the condemnor made a good faith effort to acquire
381 the property by purchase before commencing the action.

382 (b) An offer to purchase made in substantial compliance with
383 Sections 202 and 203, accompanied or followed by reasonable
384 negotiation efforts consistent with Section 307, is prima facie
385 evidence of "good faith" under subsection (a).

386 *Section 307. Scope of Efforts to Purchase.*

387 (a) In attempting to acquire the property by purchase under
388 Section 306, the condemnor, acting within the scope of its powers
389 and to the extent not otherwise forbidden by law, may negotiate
390 and contract with respect to:

391 (1) any element of valuation or damages recognized by law as
392 relevant to the amount of just compensation payable for the
393 property;

394 (2) the extent or nature of the property interest to be acquired;

395 (3) the quantity, location, or boundary of the property;

396 (4) the acquisition, removal, relocation, or disposition of
397 improvements upon the property and of personal property not
398 sought to be taken;

399 (5) the date of proposed entry and physical dispossession;

400 (6) the time and method of payment of agreed compensation
401 or other amounts authorized by law; and

402 (7) any other terms or conditions conducive to acquisition of
403 the property by agreement.

404 (b) This section does not authorize a condemnor to enter into a
405 contract in violation of law or in excess of its authority.

406 *Section 308. Purchase Efforts Waived or Excused.*

407 A condemnor's failure or inability substantially to comply with
408 Section 306 does not bar the maintenance of a condemnation
409 action, notwithstanding timely objection, if:

410 (1) compliance is waived by written agreement between the
411 property owner and the condemnor;

412 (2) one or more of the owners of the property is unknown,
413 cannot with reasonable diligence be contacted, is incapable of
414 contracting and has no legal representative, or owns an interest
415 which cannot be acquired by contract;

416 (3) due to conditions not caused by or under the control of the
417 condemnor, there is a compelling need to avoid the delay in
418 commencing the action which compliance would require;

419 (4) facts known to the condemnor support its reasonable belief
420 that an offer and negotiations for purchase would be futile or
421 useless; or

422 (5) noncompliance is excused in whole or in part by order of
423 the court under Section 508.

424 *Section 309. Condemnation Authorization.*

425 *[Alternative A]*

426 (a) A condemnor [other than a natural person] may not
427 commence a condemnation action until it has first adopted a
428 written resolution in substantial conformity with Section 310,
429 authorizing commencement and prosecution of the action.

430 *[Alternative B]*

431 [(a) A condemnor [other than a natural person] may not
432 commence a condemnation action until it has first adopted an
433 order, ordinance, resolution or other written statement required
434 or permitted by law constituting a formal authorization for
435 commencement and prosecution of the action. In addition to
436 other legal requirements, the condemnation of the matters
437 designated in Section 310.]

438 (b) The authorization may be amended or rescinded at any
439 time before or after the commencement of the condemnation
440 action.

441 *Section 310. Contents of Authorization.*

442 (a) In addition to other requirements imposed by law, the

condemnation authorization required by Section 309 shall include:

(1) a general statement of the proposed public use for which the property is to be taken and a reference to the specific statute that authorizes the taking of the property by the condemnor;

(2) a description of the general location and extent of the property to be taken, with sufficient detail for reasonable identification; and

(3) a declaration that:

(i) the proposed use is required by public convenience and necessity; and

(ii) a taking of the described property is necessary and appropriate for the proposed public use.

(b) If possession of the property is to be taken before judgment, the authorization shall direct designated officers or agents of the condemnor to take appropriate action in anticipation of, and to invoke procedures authorized by law for, obtaining early possession of the property.

(c) This section does not affect the determination of priorities between public uses.

Section 311. Effect of Condemnation Authorization.

(a) Except as otherwise provided by law and in this section, a sufficient condemnation authorization conclusively establishes the matters referred to in Section 301(a) (3) if adopted by:

(1) a public entity; or

(2) a condemnor with respect to a project authorized by a legislative or administrative body of a public entity having authority to review the matters referred to in Section 310(a) (3).

(b) A condemnation authorization creates a [rebuttable] presumption that the matters referred to in Section 310(a) (3) are true if (1) it is not conclusive under subsection (a); (2) it was adopted or last amended more than six months before commencement of the action to which it relates; or (3) the condemnor is a local public entity and the property described in its condemnation authorization is not located entirely within its territorial boundaries. This presumption is one affecting the burden of proof.

(c) A condemnation authorization has no effect to the extent that its adoption or contents were influenced or affected by fraud, corruption, bad faith, or gross abuse of discretion.

483 **ARTICLE IV**
484 **COMMENCEMENT OF ACTION BY CONDEMNOR**

- 485 *Sec.*
486 *401. Procedure Generally.*
487 *402. Commencement of Condemnation Action; Venue.*
488 *403. Time for Commencement of Condemnation Action.*
489 *404. Contents of Complaint.*
490 *405. Consolidation and Separation of Properties and*
491 *Issues.*
492 *406. Service of Process.*
493 *407. Recording Notice of Pending Action.*
494 *Section 401. Procedure Generally.*
495 The procedure for the condemnation of property under the
496 power of eminent domain is governed by the [Code] [Rules] of
497 Civil Procedure except as otherwise provided in this Code.

498 **EMINENT DOMAIN CODE**

- 499 *Section 402. Commencement of Condemnation Action;*
500 *Venue.*
501 A condemnation action is commenced by filing a complaint for
502 condemnation with the [] court in the county in which
503 the property or any part thereof sought to be taken is located. The
504 court in which the action is commenced is the proper court for
505 trial of the action, but the place of trial may be changed as in
506 other civil actions.
507 *Section 403. Time for Commencement of Condemnation*
508 *Action.*
509 A condemnor must commence a condemnation action within
510 [six] months after the date of adoption of the original or amended
511 condemnation authorization upon which it relies for the taking of
512 the property, but not later than [three] months after negotiations
513 for the purchase of the property have terminated.
514 *Section 404. Contents of Complaint.*
515 (a) In addition to other allegations required or permitted by
516 law, the complaint shall:
517 (1) designate as a plaintiff each person on whose behalf the
518 property is sought to be taken;
519 (2) name as defendants all persons who to the plaintiff's
520 knowledge are owners of or who have or claim any interest in the

521 property sought to be taken; defendants whose names are not
522 known may be included under the designation “unknown
523 claimants”;

524 (3) contain a legal description of the property and of the
525 interest therein sought to be taken; and

526 (4) allege the basis of the plaintiff’s right to take the property by
527 eminent domain and maintain the action, including (i) a reference
528 to the plaintiff’s legal authority to take the property; and (ii) a
529 statement of the purpose for which the property is sought to be
530 taken.

531 (b) If a plaintiff claims any interest in the property sought to be
532 taken or that the property is devoted to a public use, the
533 complaint must describe that interest or public use.

534 (c) For purposes of information and notice, the complaint shall
535 be accompanied by a map or diagram portraying as far as
536 practicable the property sought to be taken and the property that
537 will be affected by the taking, showing their location in relation to
538 the project for which the property is to be taken.

539 *Section 405. Consolidation and Separation of Properties and*
540 *Issues.*

541 (a) The plaintiff may include in the complaint in a condemna-
542 tion action, to the extent permitted by the law of venue, only
543 properties under substantially identical ownership that are sought
544 to be taken.

545 (b) Upon noticed motion, the court may order the consolida-
546 tion of two or more condemnation actions pending in that court if
547 it finds that (1) all defendants in the actions have consented to the
548 proposed consolidation or, after notice, have failed to object
549 thereto, or (2) consolidation would promote the interests of
550 justice and the economical resolution of similar or related issues
551 of law or fact in the actions, but would significantly prejudice
552 rights of any party or significantly increase the expenses of any
553 defendant.

554 (c) Upon noticed motion, the court may order a separation of
555 condemnation actions previously consolidated, or may direct that
556 designated issues, or issues relating to designated property, be
557 tried and determined in the action before other issues, or issues
558 relating to other property, are tried.

559

COMMENCEMENT OF ACTION

560 *Section 406. Service of Process.*

561 (a) Except as provided in subsection (b), the summons
562 together with a copy of the complaint shall be served upon each
563 defendant in the manner provided for personal service under the
564 [Rules] [Code] of Civil Procedure.

565 (b) If service cannot be made under subsection (a), the
566 defendant shall be served with process by any method reasonably
567 calculated to give the defendant actual notice and afford him an
568 opportunity to be heard.

569

EMINENT DOMAIN CODE

570 *Section 407. Recording Notice of Pending Action.*

571 (a) After commencement of a condemnation action, the
572 plaintiff shall cause a notice of the pendency of the proceedings to
573 be recorded in the office of the [recorder] in each county in which
574 any real property described in the complaint is located.

575 (b) The notice shall contain:

576 (1) the title of the action and the court, docket number, and
577 date of filing of the complaint;

578 (2) A legal description of the real property sought to be taken
579 as described in the complaint; and

580 (3) the name of each plaintiff and each defendant designated in
581 the complaint.

582 (c) The notice shall be filed for record and indexed in the same
583 manner as a notice of his pendens in other cases.

584 (d) If after the filing of a notice the complaint in the action is
585 amended to enlarge the quantity of, or nature of the interest in,
586 the real property to be taken, or to add or substitute parties, the
587 plaintiff shall cause a supplemental notice to be recorded in
588 conformity with this section.

589 (e) Upon entry of a judgment of dismissal, any party may
590 cause a notice of the dismissal to be recorded in the same office.

591 (f) A recorded notice of the pendency of a condemnation
592 action under this section constitutes notice to purchasers and
593 encumbrancers of the described property to the same extent as
594 like notices of pending litigation in other cases relating to real
595 property.

596

ARTICLE V

597

DEFENDANT'S RESPONSE

598

Sec.

599

501. Required Response.

600

502. Answer.

601

503. Disclaimer.

602

504. Rights After Default.

603

505. Additional Pleadings.

604

506. Hearing on Preliminary Objections.

605

507. Burden of Proof at Hearing on Objections.

606

508. Disposition of Defendant's Objections.

607

Section 501. Required Response.

608

The defendant's response shall consist of an answer, which must include any counterclaim or cross-complaint under Section 505, or a disclaimer of any interest in the action.

611

Section 502. Answer.

612

(a) In addition to other matters required or permitted by law, a defendant shall state in his answer:

614

(1) the nature and extent of the interest claimed by him in the property sought to be taken; and

616

(2) the nature of and basis for any preliminary objections.

617

(b) The preliminary objections must include any available ground for objecting to the maintenance of the action, including the grounds that:

620

(1) the plaintiff is not lawfully entitled to take the defendant's property for the purpose described in the complaint;

622

(2) a mandatory condition precedent to the commencement or maintenance of the action has not been satisfied; and

624

(3) the court lacks jurisdiction of the defendant or of the subject matter, or is not the proper venue, or the complaint or any other procedural aspect of the action is defective, insufficient, or improper.

628

(c) Subject to the power of the court to permit an amendment to the answer, the defendant waives (1) any ground of objection not fairly set forth in his answer, and (2) any interest in or compensation for any property sought to be taken in the action, except for his property as described or not controverted in the answer.

629

630

631

632

633

634 *Section 503. Disclaimer.*

635 (a) A disclaimer need not be in any particular form, shall be
636 signed by the defendant [or his attorney], and shall contain a
637 statement that the defendant claims no interest in the property
638 that is the subject of the action or in the compensation that may
639 be awarded.

640 (b) A disclaimer may be filed at any time, whether or not the
641 defendant is in default, and supersedes any answer previously
642 filed by him.

643 (c) Subject to subsection (d), a defendant who has filed a
644 disclaimer has no right to notice of, or to participate in, any
645 further proceedings, or to share in any award of compensation or
646 damages.

647 (d) The court may implement the disclaimer by appropriate
648 orders, including if justified an award of costs and litigation
649 expenses.

650 *Section 504. Rights After Default.*

651 A defendant whose [right to respond has been terminated by
652 default] [default has been entered]:

653 (1) is entitled to notice of and the right to respond to any
654 supplemental or amended complaint filed by the plaintiff, unless
655 the court in the order authorizing the filing of the supplemental or
656 amended complaint determines that the rights of the defaulted
657 defendant will not be affected thereby and that notice need not be
658 given;

659 (2) is entitled to notice under Section 1208 of his right to
660 receive a share of the award; and

661 (3) may file at any time a disclaimer under Section 503.

662 *Section 505. Additional Pleadings.*

663 (a) Except as provided in subsections (b) and (c), the plaintiff
664 may not file a reply or other pleading responsive to an answer.
665 New matter alleged in an answer is deemed denied.

666 (b) The defendant shall assert by way of [counterclaim] [cross-
667 complaint] all claims he has against the plaintiff relating to the
668 property sought to be taken in the action. Any claim not so
669 pleaded is forever barred. The [counterclaim] [cross-complaint]
670 and pleadings responsive thereto shall conform to the [Code]
671 [Rules] of Civil Procedure.

672 (c) The court on noticed motion and for good cause may
673 permit a defendant to assert by way of [cross-claim] [third-party

674 claim] [cross-complaint] any claim he has against another
675 defendant, or against any person not a party to the action,
676 relating to the property sought to be taken. The pleading and
677 pleadings responsive thereto shall conform to the [Code] [Rules]
678 of Civil Procedure.

679 *Section 506. Hearings on Preliminary Objections.*

680 Preliminary objections shall be heard and determined [by the
681 court] on the court's own motion, or on noticed motion by a
682 party, before final determination of the amount of just
683 compensation. The court may consolidate for hearing all
684 preliminary objections asserted in separate actions pending in
685 that court to take properties for the same use.

686 *Section 507. Burden of Proof at Hearing on Objections.*

687 [(a) Except as provided in Section 311 and Subsection (b), the
688 plaintiff has the burden of proof on all issues of fact raised in
689 connection with a preliminary objection.]

690 [(b)] If in support of a preliminary objection a defendant
691 alleges fraud, corruption, bad faith, or gross abuse of discretion
692 on the part of the plaintiff or any of its officers, agents, or
693 employees, the defendant has the burden of proving by clear and
694 convincing evidence the facts relating to that particular allega-
695 tion.

696 *Section 508. Disposition of Defendant's Objections.*

697 [(a) If the court determines that a preliminary objection is
698 meritorious, the court shall make an appropriate order including:

699 (1) dismissal of the action, in whole or in part, if the plaintiff is
700 not authorized to take the property, or some part thereof, or the
701 acts or omissions constituting the basis for the objection will
702 necessarily inflict irreparable injury upon the defendant;

703 (2) conditional dismissal, in whole or in part, unless, within a
704 specified period, the plaintiff takes corrective or remedial action
705 prescribed in the order, including, if appropriate, the adoption of
706 a new or amended condemnation authorization; or

707 (3) any other disposition required by the circumstances.]

708 [(b)] In addition to other requirements of an order sustaining a
709 preliminary objection or determining that the failure or omission
710 constituting the basis of the objection was reasonably excusable,
711 the court in the interest of justice may require the plaintiff to pay
712 to the defendant all or part of his litigation expenses incurred
713 because of the plaintiff's failure or omission constituting the basis
714 of the objection. An award of litigation expenses shall be included

715 in the order if the court finds that the plaintiff acted or failed to
716 act without justification.

717

ARTICLE VI

718

**DEPOSIT AND POSSESSION PRIOR
TO JUDGMENT**

719

720

Sec.

721

601. Deposit of Appraised Value of Property.

722

602. Notice of Deposit.

723

603. Motion to Increase or Reduce Amount Deposited.

724

604. Motion for Withdrawal of Deposited Funds Before

725

Judgement.

726

605. Determination of Application for Withdrawal;

727

Waiver of Objections.

728

606. Effect of Withdrawal.

729

607. Deposit and Withdrawal Inadmissible in Evidence.

730

608. Deposit at Interest.

731

609. Order of Possession.

732

610. Notice of Order of Possession.

733

Section 601. Deposit of Appraised Value of Property.

734

(a) At any time before judgment, the plaintiff may deposit with
735 the court the full amount indicated by an appraisal which the
736 condemnor believes to be just compensation for all or a specified
737 part of the property sought to be taken. The deposit may be made
738 whether or not the plaintiff applies for an order of possession or
739 intends to do so.

740

(b) If within [30] days after the commencement of the action the
741 plaintiff does not make a deposit or makes a deposit covering less
742 than all properties sought to be taken, the court after hearing on
743 noticed motion and for good cause may order the plaintiff to
744 make a deposit of the full amount of compensation for the
745 property in which the moving defendant claims an interest, based
746 upon an appraisal in accordance with subsection (a).

747

(c) If the plaintiff fails to comply substantially with the order
748 for deposit within the time allowed by the order, the defendant
749 may move to dismiss the action under Section 1301.

750

(d) If a deposit has previously been made under this section, the
751 court may require an additional deposit to be made as a condition
752 to the allowance of leave to amend the complaint to increase the

753 amount or change the nature of the interest in the property
754 sought to be taken.

755 (e) On noticed motion, or in an emergency upon ex parte
756 application, the court may permit the plaintiff to make a deposit
757 if the plaintiff presents facts by affidavit showing that (1) good
758 cause exists for permitting an immediate deposit to be made, (2)
759 an adequate appraisal has not been completed and cannot
760 reasonably be prepared before making the deposit, and (3) the
761 amount of the deposit proposed to be made is not less than the
762 full amount of compensation the plaintiff, in good faith, estimates
763 will be payable for the property. In its order permitting a deposit
764 under this subsection, the court shall require a copy or written
765 summary of the required appraisal to be served within a
766 reasonable time, accompanied by the deposit of any additional
767 amount of compensation shown by the appraisal.

768 *Section 602. Notice of Deposit.*

769 On making a deposit under Section 601, the plaintiff
770 immediately shall serve on all parties who have appeared in the
771 action a notice that the deposit has been made, accompanied by a
772 copy of the written appraisal or summary of the appraisal upon
773 which the amount of the deposit was based, or by a copy of all
774 affidavits upon which an order for deposit under Section 601 (e)
775 was based.

776 *Section 603. Motion to Increase or Reduce Amount*
777 *Deposited.*

778 (a) Upon noticed motion by the plaintiff, or by a defendant for
779 whose property a deposit was made, the court shall determine or
780 redetermine whether the amount deposited is the reasonably
781 estimated compensation for the taking of that property.

782 (b) If the court determines that the estimated compensation for
783 the property of the defendant making the motion exceeds the
784 amount deposited and that the plaintiff has not taken possession
785 of the property, it shall enter an order requiring the plaintiff to
786 increase the deposit, or denying the plaintiff the right to take
787 possession of the property before judgment until the amount on
788 deposit has been increased to not less than the estimated
789 compensation specified in the order.

790 (c) If the court determines that the estimated compensation for
791 the property of the defendant making the motion exceeds the
792 amount deposited and that the plaintiff has taken possession of

the property pursuant to an order of possession, it shall require the plaintiff to increase the amount on deposit to not less than the estimated compensation specified in the order.

(d) If the plaintiff fails to increase the deposit by the amount and within the time allowed by the court in an order under subsection (b) or (c), the defendant who obtained the order may move to dismiss the action under Section 1301.

(e) If the court determines that the amount deposited exceeds the estimated compensation for the property for which the deposit was made, it may permit the plaintiff to withdraw the excessive portion of the deposit if it has not been withdrawn by the defendant.

Section 605. Motion for Withdrawal of Deposited Funds Before Judgment.

(a) By motion before entry of judgment, the defendant may apply to the court for leave to withdraw all or any portion of the amount on deposit. The motion shall specify the applicant's property for which the deposit was made and request leave to withdraw a stated amount from the funds on deposit.

(b) The defendant shall give notice of the motion, and of the time and place of the hearing thereon, to the plaintiff who made the deposit and to all other parties who have appeared in the action. Before the hearing, the plaintiff may serve any other person with notice of the time and place for the hearing, together with a statement that his failure to object at or before the hearing will be deemed a waiver of any objections he has to the proposed withdrawal.

(c) This section does not prevent the court from authorizing a defendant to withdraw deposited funds without notice or hearing if the plaintiff consents in writing.

Section 605. Determination of Application for Withdrawal; Waiver of Objections.

(a) A party who receives notice of hearing under Section 604 waives all objections to the proposed withdrawal that are not timely asserted, and has no claim against the plaintiff for compensation to the extent of any amount withdrawn pursuant to the order of the court. The plaintiff remains liable for compensation that may be awarded to any party who did not receive notice, and to any other owner of record, but if the liability is enforced plaintiff may recover from a defendant to the extent he has been overpaid.

834 (b) An order permitting withdrawal may impose terms and
835 conditions which justice requires, including if appropriate a
836 requirement that the defendant provide security, in an amount
837 and manner approved by the court, to guarantee repayment of
838 any amount he withdraws in excess of the total amount to which
839 he is entitled as finally determined by the judgment.

840 *Section 606. Effect of Withdrawal.*

841 A defendant who withdraws money under this Article waives
842 all objections and defenses to the action and to the taking of his
843 property, except for any claim to greater compensation.

844 *Section 607. Deposit and Withdrawal Inadmissible in*
845 *Evidence.*

846 The amount deposited or withdrawn under this Article is not
847 admissible in evidence and may not be referred to at the trial.

848 *Section 608. Deposit at Interest.*

849 Upon motion of a party at any time after a deposit has been
850 under this Article, the court may direct that the money on deposit
851 and not withdrawn be invested in [investments lawful for
852 fiduciaries] subject to reasonable terms and conditions. Interest
853 earned or other increments derived from the investment shall be
854 allocated, credited, and disbursed between the parties as directed
855 by the court. As between the parties to the action, the money
856 invested remains at the risk of the party who made the motion.

857 *Section 609. Order of Possession.*

858 (a) As used in this section, "record owner" means the owner of
859 the legal or equitable title to the fee or any lesser interest in
860 property as shown by recorded deeds or other recorded
861 instruments.

862 (b) At any time before entry of judgment, upon motion by the
863 plaintiff after notice to the record owner of the property and to
864 persons in actual physical occupancy, if any, the court may direct
865 the plaintiff to take possession of all or a designated part of the
866 property on or after a specified date on such terms and conditions
867 as justice requires, if the court determines that:

868 (1) the plaintiff has deposited the estimated amount of just
869 compensation, or before the date of taking possession will have
870 done so, in accordance with Sections 601 to 603; and

871 (2) all legal requirements for the taking of possession of the
872 property by plaintiff have been waived or satisfied, or will be
873 satisfied before the time possession is to be taken.

(c) In determining the date of possession and any terms and conditions to be specified in the order, the court shall consider, in addition to the matters required by subsection (b), all relevant facts presented at the hearing, including:

(1) the extent to which objections to plaintiff's right to take the property, that have not been resolved in favor of plaintiff, are insubstantial on their merits;

(2) the extent to which the plaintiff has a compelling need to take possession at a particular time, in view of its construction schedule or plan of operation for the property and the situation and other circumstances of the property with respect to the schedule or plan;

(3) the extent to which the property owner or other person in physical occupancy of the property would sustain substantial hardship if possession were taken on the date requested by the plaintiff; and

(4) the extent to which any additional cost or loss which the plaintiff would sustain by reason of a postponement of possession, or any additional hardship which the defendant or occupant would sustain by reason of a taking of possession on the date requested by plaintiff, may be minimized by the imposition of reasonable conditions or limitations upon the plaintiff's possession or may be mitigated through reasonable efforts by the respective parties.

(d) The court for good cause may authorize the plaintiff to take possession of the property without serving notice upon a record owner not occupying the property.

Section 610. Notice of Order of Possession.

Promptly after the making of the order, and not later than the time possession is actually taken, the plaintiff shall give notice of the order for possession to all parties who have appeared in the action and to any persons in actual physical occupancy of the property described in the order.

ARTICLE VII

PROCEEDINGS BEFORE TRIAL

Sec.

701. Application of Article.

- 911 702. *Scope of Discovery.*
912 703. *Protective Orders.*
913 704. *Duty to Supplement or Amend Response.*
914 705. *Effect of Article on Admissibility of Evidence.*
915 706. *Effect of Discovery Proceedings Upon Trial*
916 *Evidence.*
917 707. *Pretrial Order.*
918 708. *Offer of Settlement.*
919 *Section 701. Application of Article.*
920 Discovery and pretrial conferences in condemnation actions
921 are governed by the [Rules] [Code] of Civil Procedure, except as
922 otherwise provided in this Article.
923 *Section 702. Scope of Discovery.*
924 (a) Without leave of court, and without showing any need for
925 the information sought or of hardship or prejudice if discovery is
926 withheld, a party to a condemnation action may:
927 (1) [by request for production] require any other party to
928 produce for inspection and copying, or to furnish a copy of, any
929 written appraisals, reports, maps, diagrams, charts, tables, or
930 other documents in his possession or under his control that
931 contain engineering, economic, valuation, comparable sales, or
932 other data pertaining to the issue of compensation;
933 (2) by written interrogatory require any other party to disclose
934 the identity and location of each person whom the other party
935 expects to call as a witness at the trial on any question relating to
936 the issue of compensation, to state the substance of the facts and
937 opinions to which the witness is expected to testify, and to
938 summarize the grounds for each opinion;
939 (3) by written interrogatory or deposition require any other
940 party to disclose the identity and location of every person,
941 including an employee or agent, whom he has caused to examine
942 the property sought to be taken, or whom he has consulted or
943 employed to provide information or to express an opinion
944 relating thereto, in order to assist in determining the amount of
945 compensation, whether or not the person so identified is expected
946 to be called as a witness at the trial; and
947 (4) by deposition examine any person whose identity is
948 discoverable under paragraphs (2) and (3), and whom the other
949 party expects to call as a witness at the trial, with respect to his
950 findings and opinions on any question relating to the issue of
951 compensation.

952 (b) A party may discover the findings and opinions, on any
953 question relating to the issue of compensation, of a person whose
954 identity is discoverable under paragraphs (2) and (3) of subsection
955 (a), but whom the other party does not expect to call as a witness
956 at the trial, only with leave of court first obtained on noticed
957 motion for good cause shown and subject to reasonable
958 conditions required by the court.

959 *Section 703. Protective Orders.*

960 (a) Discovery under Section 702 is subject to the power of the
961 court to make orders which justice requires to protect a person
962 from annoyance, embarrassment, oppression, or undue burden or
963 expense, but discovery authorized by Section 702 may not be
964 denied or limited solely because the documents, information,
965 facts, opinions, or other matters sought either were or were not
966 prepared, obtained, or procured in anticipation of litigation or in
967 preparation for trial in the particular action.

968 (b) The party taking the deposition of an independent expert
969 witness shall pay the expert a reasonable fee for time spent in
970 preparing for and in giving his deposition.

971 *Section 704. Duty to Supplement or Amend Response.*

972 A party who has responded to a request for discovery is under a
973 duty seasonably to supplement or amend his response by
974 supplying any subsequently obtained information upon the basis
975 of which he knows that an earlier response by him was incorrect
976 when made or, though correct when made, is no longer true or
977 accurate, if a failure to supply the information would tend
978 prejudicially to mislead the other party.

979 *Section 705. Effect of Article on Admissibility of Evidence.*

980 This Article does not make admissible any evidence not
981 otherwise admissible nor permit a witness to base an opinion on
982 any matter not a legally proper basis for the opinion.

983 *Section 706. Effect of Discovery Proceedings Upon Trial*
984 *Evidence.*

985 (a) Except as provided in subsection (b),

986 (1) a party required to produce documentary data under this
987 Article, over objection by a party who was entitled to production
988 thereof, may not call a witness to testify at the trial on any
989 question relating to valuation or compensation, unless copies of
990 all appraisals, reports, maps, diagrams, charts, tables, or other
991 documents prepared by or under the direction of the witness, or
992 upon which his testimony is based in whole or in part, were

993 supplied in substantial compliance with this Article; and

994 (2) a party who was requested to disclose the identity of a
995 person by discovery proceedings under this Article may not call
996 and examine that person at the trial, over objection by the party
997 seeking the disclosure, with respect to any issue relating to
998 valuation or compensation, unless the witness was identified and
999 all additional properly requested information relating to the
1000 witness or his testimony was supplied in substantial compliance
1001 with this Article.

1002 (b) Upon such conditions as are just, the court may permit a
1003 party to call, or elicit an opinion or other testimony from, a
1004 witness whose testimony is barred under subsection (a), if the
1005 court determines that the failure to respond to discovery was due
1006 to excusable mistake, inadvertence, or surprise, and did not
1007 materially impair the ability of the objecting party fairly to
1008 present the merits of his case.

1009 *Section 707. Pretrial Order.*

1010 The court may [hold a pretrial conference and], in addition to
1011 other matters, include in its pretrial order terms and conditions
1012 reasonably necessary to enforce any agreement between the
1013 parties respecting the scope or design of the project, the location
1014 or relocation of improvements, or the performance of work by
1015 the plaintiff, and in connection therewith may define the scope of
1016 the issues and order of presentation of evidence at the trial.

1017 *Section 708. Offer of Settlement.*

1018 (a) Not less than [ten] days before the trial on the issue of the
1019 amount of compensation, either party may file and serve on the
1020 other party an offer of settlement, and within [five] days
1021 thereafter the party served may respond by filing and serving his
1022 offer of settlement. The offer shall state that it is made under this
1023 section and specify the amount, exclusive of interest and costs,
1034 which the party serving the offer is willing to agree is just
1025 compensation for the property sought to be taken. The offer
1026 supersedes any offer previously made under this section by the
1027 same party.

1028 (b) An offer of settlement is deemed rejected unless an
1029 acceptance in writing is filed and served on the party making the
1030 offer, before the commencement of the trial on the issue of the
1031 amount of compensation.

1032 (c) If the offer is rejected, it may not be referred to for any
1033 purpose at the trial, but may be considered solely for the purpose

1034 of awarding costs and litigation expenses under Section 1205.
1035 (d) This section does not limit or restrict the right of a
1036 defendant to payment of any amounts authorized by law in
1037 addition to compensation for the property taken from him.

1038 **ARTICLE VIII**

1039 **INFORMAL PROCEDURE FOR DISPUTES**
1040 **INVOLVING LIMITED AMOUNTS**

1041 *Sec.*

1042 *801. Informal Claims Procedure Authorized.*

1043 *802. Request for Informal Procedure.*

1044 *803. Hearing.*

1045 *804. Demand for retrial.*

1046 *Section 801. Informal Claims Procedure Authorized.*

1047 This Article applies whenever only the amount of compensa-
1048 tion is in dispute and (1) the total compensation demanded by all
1049 defendants is less than [\$20,000], excluding interest and costs, or
1050 (2) the difference between the latest offer of the condemnor and
1051 the latest demand by all defendants is less than [\$5,000]. [The
1052 Supreme Court may adopt rules governing proceedings under
1053 this Article.]

1054 *Section 802. Request for Informal Procedure.*

1055 A party may file with the court a written request that the issue
1056 of the amount of compensation be determined under this Article,
1057 identifying the property, and setting forth the amount of the
1058 plaintiff's latest offer and the defendant's latest demand for
1059 compensation.

1060 *Section 803. Hearing.*

1061 (a) If the court determines that the request should be granted, it
1062 shall hold a hearing upon reasonable notice to the parties to
1063 determine compensation.

1064 (b) The court shall proceed without a jury and in an informal
1065 manner. The parties may present oral and documentary proof
1066 and may argue in support of their respective positions, but the
1067 rules of evidence need not be followed. Neither party is required
1068 to offer the opinion of an expert or to be represented by an
1069 attorney. Unless demanded by a party and at his own expense, a
1070 record of testimony received at the hearing need not be kept.

1071 (c) Costs shall be claimed and taxed as in other condemnation

1072 actions. Upon entry of judgment, the clerk shall serve upon the
1073 parties a copy of the judgment with notice of its entry, together
1074 with instructions as to the procedure for demanding a retrial.

1075 *Section 804. Demand for Retrial.*

1076 (a) Either party, within 30 days after entry of the judgment,
1077 may reject the judgment and file a written demand for trial under
1078 Article IX. The action shall be restored to the docket of the court
1079 as though proceedings under this Article had not occurred.

1080 (b) If the condemnor files a demand under subsection (a) and
1081 ultimately obtains a judgment no more favorable to him, the
1082 court may require him to pay, in addition to costs, the defendant's
1083 litigation expenses incurred after the demand was filed.

1084 ARTICLE IX

1085 PROCEDURE FOR DETERMINING 1086 JUST COMPENSATION

1087 *Sec.*

1088 *901. Setting for Trial.*

1089 *902. Trial by Jury; Waiver.*

1090 *903. Right to Open and Close; Order of Presentation of*
1091 *Evidence.*

1092 *904. Burden of Proof.*

1092 *905. Separation of Issues of Compensation and Appor-*
1094 *tionment.*

1095 *906. Separate determination of Facts.*

1096 *907. Power of Court to Control Scope of Trial Participa-*
1097 *tion.*

1098 *Section 901. Setting for Trial.*

1099 (a) To the extent practicable, actions under this [Code] shall be
1100 heard and tried in advance of other civil actions.

1101 (b) The court may require any severable nonjury issue to be
1102 tried separately in advance of the trial on the issue of the amount
1103 of compensation.

1104 *Section 902. Trial by Jury; Waiver.*

1105 *[Alternative A]*

1106 (a) The amount of compensation [and any additional issue for
1107 which the right to trial by jury is secured by the Constitution]
1108 shall be determined by a jury only if a party entitled to participate
1109 in the trial of the issue [expressly] demands trial by jury. The

1110 court shall determine all other issues without a jury.

1111 [Alternative B]

1112 (a) The amount of compensation [and any additional issue for
1113 which the right to trial by jury is secured by the constitution] shall
1114 be determined by a jury unless, and to the extent that, the parties
1115 entitled to participate in the trial of the issue [expressly] waive the
1116 right to trial by jury. The court shall determine all other issues
1117 without a jury.

1118 (b) The number of jurors, method used for impanelling and
1119 selecting jurors, number and method for exercising challenges,
1120 form of oath to be administered, number of jurors required to
1121 return a verdict, and all other procedures relating to trial by jury,
1122 to the extent practicable, shall conform to the requirements
1123 applicable in civil actions under the [Code] [Rules] of civil
1124 Procedure.

1125 *Section 903. Right to Open and Close; Order of Presentation*
1126 *of Evidence.*

1127 (a) The defendant shall make the first opening statement,
1128 proceed first in the presentation of evidence on the issue of the
1129 amount of compensation, and make the final closing argument.

1130 (b) The court may designate the order in which multiple parties
1131 make their respective opening statements and closing arguments,
1132 and the order in which they present evidence.

1133 *Section 904. Burden of Proof.*

1134 No party has the burden of proof on the issue of the amount of
1135 compensation.

1136 *Section 905. Separation of Issues of Compensation and*
1137 *Apportionment.*

1138 The court or jury shall first determine the total compensation
1139 as between the plaintiff and all defendants claiming an interest in
1140 the property. The court or jury shall then determine any further
1141 questions in the action, including the apportionment of the
1142 amount awarded. After the amount of compensation has been
1143 determined, the plaintiff may withdraw from further participa-
1144 tion in the trial.

1145 *Section 906. Separate Determination of Facts.*

1146 If there is a partial taking, the court may determine, or may
1147 direct the jury in its verdict to determine, separately:

1148 (1) the fair market value of the property being taken;

1149 (2) the fair market value of the entire property before the taking
1150 and the fair market value of the remainder after the taking; and

1151 (3) the amount representing loss of good will, compensable
1152 under Section 1016.

1153 *Section 907. Power of Court to Control Scope of Trial*
1154 *Participation.*

1155 The court in the interest of justice may limit the scope of trial
1156 participation by any party on the issue of the amount of
1157 compensation, and may require that the presentation of evidence,
1158 examination of witnesses, and statements or argument to the trier
1159 of fact by a party be restricted to matters germane to the amount
1160 of compensation for the particular property that party seeks to
1161 acquire or in which he claims an interest.

1162

ARTICLE X

1163

COMPENSATION

1164 *Sec.*

1165 *1001. Compensation Standards.*

1166 *1002. Compensation for Taking.*

1167 *1003. Date of Valuation.*

1168 *1004. Fair Market Value Defined.*

1169 *1005. Effect of Condemnation Action on Value.*

1170 *1006. Compensation to Reflect Project as Planned.*

1171 *1007. "Entire Property."*

1172 *1008. Special Assessment Proceedings Excluded.*

1173 *1009. Use by Defendant; Risk of Loss.*

1174 *1010. Compensation for Growing Crops and Improve-*
1175 *ments.*

1176 *1011. Improvements Partially Located on Land Not*
1177 *Taken.*

1178 *1012. Compensation for Divided Interests.*

1179 *1013. Taking of Leasehold Interest.*

1180 *1014. Acquisition of Property Subject to Lien.*

1181 *1015. Property Subject to Life Tenancy.*

1182 *1016. Loss of Goodwill.*

1183 *Section 1001. Compensation Standards.*

1184 (a) An owner of property acquired by eminent domain is
1185 entitled to compensation determined under the standards
1186 prescribed in this Article.

1187 (b) Unless otherwise provided by law, the right to compensa-

tion accrues upon the date of filing of the complaint.

(c) Except as specifically provided in this Article, compensation, damages, or other relief to which a person is otherwise entitled under this Code or other law are not affected, but duplication of payment is not permitted.

Section 1002. Compensation for Taking.

(a) Except as provided in subsection (b), the measure of compensation for a taking of property is its fair market value determined under Section 1004 as of the date of valuation.

(b) If there is a partial taking of property, the measure of compensation is the greater of (1) the value of the property taken as determined under subsection (a) or (2) the amount by which the fair market value of the entire property immediately before the taking exceeds the fair market value of the remainder immediately after the taking.

Section 1003. Date of Valuation.

(a) Except as provided in subsection (b), the date of valuation is the earlier of (1) the date upon which the plaintiff first makes a deposit under Article VI or (2) the date upon which the trial of the issue of the amount of compensation commences.

(b) On motion of the defendant made not later than [60] days before the date of trial of the issue of the amount of compensation:

(1) If the amount first deposited by the plaintiff is determined to be insufficient under Section 603 and the plaintiff does not deposit the additional amount required by the court's order within [30 days] after the order is made, the court may designate as the date of valuation the earlier of (i) the date on which the plaintiff thereafter deposits the required additional amount or (ii) the date upon which the trial of the issue of the amount of compensation begins.

(2) If the court determines that the date of valuation required by subsection (a) is more than [one year] after the commencement of the action and that the defendant did not cause the delay, the court shall designate as the date of valuation the date on which the action was commenced.

(3) If the court determines that the plaintiff entered into possession of the defendant's property without the consent of the defendant, and not under the authority of an order for possession, the court may designate as the date of valuation the date on which the plaintiff entered into possession.

1229 (c) At a retrial of the issue of compensation, the date of
1230 valuation is the date determined to be applicable under this
1231 section for the purpose of the original trial.

1232 *Section 1004. Fair Market Value Defined.*

1233 (a) Except as provided in subsection (b), (1) the fair market
1234 value of property for which there is a relevant market is the price
1235 which would be agreed to by an informed seller who is willing but
1236 not obligated to sell, and an informed buyer who is willing but
1237 not obligated to buy; and (2) the fair market value of property for
1238 which there is no relevant market is its value as determined by any
1239 method of valuation that is just and equitable.

1240 (b) The fair market value of property owned by a public entity
1241 or other person organized and operated upon a nonprofit basis is
1242 deemed to be not less than the reasonable cost of functional
1243 replacement if the following conditions exist: (1) the property is
1244 devoted to and is needed by the owner in order to continue in
1245 good faith its actual use to perform a public function, or to render
1246 nonprofit educational, religious, charitable, or eleemosynary
1247 services; and (2) the facilities or services are available to the
1248 general public.

1249 (c) The cost of functional replacement under subsection (b)
1250 includes (1) the cost of a functionally equivalent site; (2) the cost
1251 of relocating and rehabilitating improvements taken, or if
1252 relocation and rehabilitation is impracticable, the cost of
1253 providing improvements of substantially comparable character
1254 and of the same or equal utility; and (3) the cost of betterments
1255 and enlargements required by law or by current construction and
1256 utilization standards for similar facilities.

1257 *Section 1005. Effect of Condemnation Action on Value.*

1258 (a) The fair market value of the property taken, or of the entire
1259 property if there is a partial taking, does not include an increase
1260 or decrease in value before the date of valuation that is caused by
1261 (1) the proposed improvement or project for which the property is
1262 taken; (2) the reasonable likelihood that the property would be
1263 acquired for that improvement or project; or (3) the condemna-
1264 tion action in which the property is taken.

1265 (b) If, before completion of the project as originally adopted,
1266 the project is expanded or changed to require the taking of
1267 additional property, the fair market value of the additional
1268 property does not include a decrease in value before the date of

valuation, but does include an increase in value before the date on which it became reasonably likely that the expansion or change in the scope of the project would occur, if the decrease or increase is caused by any of the factors described in Subsection (a).

(c) Notwithstanding subsections (a) and (b), a decrease in value before the date of valuation which is caused by physical deterioration of the property within the reasonable control of the property owner, and by his unjustified neglect, may be considered in determining fair market value.

Section 1006. Compensation to Reflect Project as Planned.

(a) If there is a partial taking of property, the fair market value of the remainder on the valuation date shall reflect increases or decreases in value caused by the proposed project including any work to be performed under an agreement between the parties.

(b) The fair market value of the remainder, as of the date of valuation, shall reflect the time the damage or benefit caused by the proposed improvement or project will be actually realized.

Section 1007. "Entire Property."

For the purpose of determining compensation under this Article, all parcels of real property, whether contiguous or noncontiguous, that are in substantially identical ownership and are being used, or are reasonable suitable and available for use in the reasonably foreseeable future, for their highest and best use as an integrated economic unit, shall be treated as if the entire property constitutes a single parcel. Any issue arising under this section shall be decided by the court [trier of fact].

Section 1008. Special Assessment Proceedings Excluded.

If there is a partial taking of property and special assessments or charges are imposed upon the remainder to pay for all or part of the project, the increase in value of the remainder caused by the project shall be considered in determining its value after the partial taking only to the extent the increase exceeds the amount of the special assessments or charges.

Section 1009. Use by Defendant; Risk of Loss.

(a) Unless the court otherwise directs, the defendant may use the property sought to be taken for any lawful purpose before the date on which the plaintiff is authorized to take possession. Thereafter, the defendant may use the property only with the consent of, and subject to any limitations required by, the plaintiff. The uses authorized by this subsection include any work

1309 on the property and the planting, cultivation, and removal of
1310 crops. The compensation awarded the defendant shall include an
1311 amount sufficient to compensate for loss caused by any
1312 restriction or limitation imposed by the court upon his right to
1313 use the property.

1314 (b) As between the plaintiff and defendant, the defendant has
1315 the risk of loss due to damage, destruction, or unauthorized
1316 removal of improvements or crops situated upon the property
1317 until the earliest of (1) the date after which, by order of the court,
1318 the defendant's right to use the property is substantially limited or
1319 forbidden; (2) the date upon which the plaintiff is authorized to
1320 take possession; or (3) the date upon which title is transferred to
1321 the plaintiff.

1322 *Section 1010. Compensation for Growing Crops and Im-*
1323 *provements.*

1324 (a) The compensation for crops growing on the property on
1325 the date of valuation is the higher of (1) the current fair market
1326 value of the crops in place, assuming the right to bring them to
1327 maturity and to harvest them, or (2) the amount by which the
1328 existence of the crops enhances the fair market value of the
1329 property.

1330 (b) The compensation for an interest in improvements
1331 required to be taken under Section 209 is the higher of (1) the fair
1332 market value of the improvements, assuming their immediate
1333 removal from the property, or (2) the amount by which the
1334 existence of the improvements enhances the fair market value of
1335 the property.

1336 (c) If crops or improvements are destroyed, removed, or
1337 damaged by defendant after the date of valuation, the amount of
1338 compensation shall be adjusted to reflect the extent to which the
1339 fair market value of the property has thereby been reduced.

1340 (d) Crops or improvements that are first placed upon the
1341 property after the date of valuation shall be excluded from
1342 consideration in determining the amount of the award, except
1343 that the award shall be adjusted to include the reasonable and
1344 necessary cost of providing (1) improvements required by law,
1345 and (2) improvements, other than ordinary and routine
1346 maintenance, made for the primary purpose of protecting persons
1347 and property from a risk of injury caused by the condition of a
1348 damaged or partially completed structure, or for the purpose of
1349 protecting partially installed machinery or equipment from

1350 damage, deterioration, or vandalism.

1351 *Section 1011. Improvements Partially Located on Land Not*
1352 *Taken.*

1353 If a compensable improvement is located in part upon the
1354 property sought to be taken and in part on property not sought to
1355 be taken, the court, upon motion by either party and upon a
1356 determination that justice so requires, may direct the plaintiff to
1357 acquire the entire improvement, including that portion of it
1358 located upon the property not sought to be taken, together with
1359 any easement or other interest reasonably necessary for use of the
1360 improvement or for the purpose of its demolition, removal, or
1361 relocation.

1362 *Section 1012. Compensation for Divided Interests.*

1363 The amount of compensation for the taking of property in
1364 which divided interests exist is based upon the fair market value
1365 of the property considered as a whole, giving appropriate
1366 consideration to the effect upon market value of the terms and
1367 circumstances under which the separate interests are held.

1369 *Section 1013. Taking of Leasehold Interest.*

1369 (a) If all or part of the property taken includes a leasehold
1370 interest, the effect of the condemnation action upon the rights
1371 and obligations of the parties to the lease is governed (1) by the
1372 provisions of the lease, and (2) in the absence of applicable
1373 provisions in the lease, by this section.

1374 (b) If there is a partial taking and the part of the property
1375 taken includes a leasehold interest that extends to the remainder,
1376 the court may determine that (1) the lease terminates as to the
1377 part of the property taken but remains in force as to the
1378 remainder, in which case the rent reserved in the lease is
1379 extinguished to the extent it is affected by the taking; or (2) the
1380 lease terminates as to both the part taken and the remainder; if
1381 the part taken is essential to the purposes of the lease or the
1382 remainder is no longer suitable for the purpose of the lease.

1383 (c) The termination or partial termination of a lease under this
1384 section shall occur at the earlier of (1) the date on which, under an
1385 order of the court, the plaintiff is permitted to take possession of
1386 the property, or (2) the date on which title to the property is
1387 transferred to the plaintiff.

1388 (d) This section does not affect or impair a lessee's right to
1389 compensation if his leasehold interest is taken in whole or in part.

1390 *Section 1014. Acquisition of Property Subject to Lien.*

1391 Notwithstanding the provisions of an agreement, if any,
1392 relating to a lien encumbering the property:

1393 (1) if there is a partial taking, the lienholder may share in the
1394 amount of compensation awarded only to the extent determined
1395 by the court to be necessary to prevent an impairment of his
1396 security, and the lien shall continue upon the part of the property
1397 not taken as security for the unpaid portion of the indebtedness
1398 until it is paid; and

1399 (2) neither the plaintiff nor defendant is liable to the lienholder
1400 for any penalty for prepayment of the debt secured by the lien,
1401 and the amount awarded by the judgment to the lienholder shall
1402 not include any penalty therefor.

1403 *Section 1015. Property Subject to Life Tenancy.*

1404 If the property taken is subject to a life tenancy, the court may
1405 include in the judgment a requirement that:

1406 (1) the award be apportioned and distributed on the basis of
1407 the respective values of the interests of the life tenant and
1408 remainderman;

1409 (2) the compensation be used to purchase comparable
1410 property to be held subject to the life tenancy;

1411 (3) the compensation be held in trust and administered subject
1412 to the terms of the instrument that created the life tenancy; or

1413 (4) any other equitable arrangement be carried out.

1414 *Section 1016. Loss of Goodwill.*

1415 (a) In addition to fair market value determined under Section
1416 1004, the owner of a business conducted on the property taken, or
1417 on the remainder if there is a partial taking, shall be compensated
1418 for loss of goodwill only if the owner proves that the loss (1) is
1419 caused by the taking of the property or the injury to the
1420 remainder, (2) cannot reasonably be prevented by a relocation of
1421 the business or by taking steps and adopting procedures that a
1422 reasonably prudent person would take and adopt in preserving
1423 the goodwill; (3) will not be included in relocation payments
1424 under Article XIV, and (4) will not be duplicated in the
1425 compensation awarded to the owner.

1426 (b) Within the meaning of this section, "goodwill" consists of
1427 the benefits that accrue to a business as a result of its location,
1428 reputation for dependability, skill, or quality, and any other
1429 circumstances resulting in probable retention of old or acquisi-
1430 tion of new patronage.

1431

ARTICLE XI

1432

EVIDENCE IN CONDEMNATION ACTIONS

1433

Sec.

1434

1101. Scope of Article.

1435

1102. View of Property Taken.

1436

1103. Opinion Evidence Competent to Prove Value.

1437

1104. Supporting Evidence.

1438

1105. Evidence Relating to Remainder Value in Partial

1439

Taking.

1440

1106. Matters upon Which Opinion Testimony May Be

1441

Based.

1442

1107. Sales of Subject Property.

1443

1108. Comparable Sales.

1444

1109. Leases.

1445

1110. Capitalization of Rental Income.

1446

1111. Reproduction or Replacement Cost.

1447

1112. Conditions in General Vicinity.

1448

1113. Matter upon Which Opinion May Not Be Based.

1449

Section 1101. Scope of Article.

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(a) Actions under this Code are governed by the rules of

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evidence applicable in other civil actions and as supplemented by

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this Article.

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(b) This Article does not create or diminish any right to

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compensation or damages, and does not affect the meaning of

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“just compensation” under the law of this State.

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Section 1102. View of the Property Taken.

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(a) Upon motion of a party or its own motion, the court may

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direct the jury to be placed in charge of an officer of the court and

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taken personally to view the property sought to be taken. Upon

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like motion, if the case is tried before the court without a jury, the

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judge presiding at the trial may view the property. The court may

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prescribe additional terms and conditions consistent with this

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section.

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(b) During a view of the property by the jury, the judge

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presiding at the trial shall be present and supervise the

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proceedings. The parties, their attorneys, engineers, and other

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representatives may be present during a view by the jury or judge.

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(c) If a view is taken by a jury, only the judge presiding at the

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trial or a person designated by the court may make to the jury

1470 during the view a statement relating to the subject matter of the
1471 action.

1472 (d) The physical characteristics of the property and of
1473 surrounding property, and any other matters observed during a
1474 view, may be considered by the trier of fact solely for the purpose
1475 of understanding and weighing the valuation evidence received at
1476 the trial, and do not constitute independent evidence on the issue
1477 of the amount of compensation.

1478 *Section 1103. Opinion Evidence Competent to Prove Value.*

1479 (a) Upon proper foundation, opinion evidence as to the value
1480 of property may be given in evidence only by one or more of the
1481 following persons:

1482 (1) a witness qualified by knowledge, skill, experience, training,
1483 or education to express an opinion as to the value of the property;

1484 (2) an owner of the property; or

1485 (3) a shareholder, officer, or regular employee designated to
1486 testify on behalf of an owner of the property, if the owner is not a
1487 natural person.

1488 (b) This section does not preclude the admissibility of other
1489 evidence explaining and enabling the trier of fact to understand
1490 and weigh opinion testimony given under Subsection (a).

1491 [(c) The court, for good cause, and in the interest of expediting
1492 the trial, may limit the number of witnesses permitted to give
1493 testimony for any party in the form of an opinion with respect to
1494 the issue of the amount of compensation.]

1495 *Section 1104. Supporting Evidence.*

1496 For the purpose of supporting an opinion as to the value of
1497 property, evidence may be received relating but not limited to the
1498 following factors:

1499 (1) extent of loss of property and improvements;

1500 (2) present use of the property, and the highest and best use for
1501 which it is reasonably suitable and available in the reasonably
1502 foreseeable future;

1503 (3) extent of loss of a legal nonconforming use;

1504 (4) extent of damage to crops; and

1505 (5) existing zoning or other restrictions upon use, and the
1506 reasonable probability of a change in those restrictions.

1507 *Section 1105. Evidence Relating to Remainder Value in*
1508 *Partial Taking.*

1509 (a) For the purpose of supporting an opinion as to the value of
1510 a remainder after a partial taking, evidence may be received

1511 relating but not limiting to the following factors:

1512 (1) extent of increase or decrease in the productivity and
1513 convenience of use of the remainder reasonably attributable to
1514 the taking;

1515 (2) extent of improvement in or impairment of access to the
1516 public highways from the remainder upon completion of the
1517 project;

1518 (3) extent of benefit or detriment caused by the project due to a
1519 change in the grade of a right of way abutting the remainder;

1520 (4) extent of enhancement or loss of appearance, view, or light
1521 and air as a consequence of the project;

1522 (5) extent of benefit or damage resulting from severance of
1523 land or improvements;

1524 (6) extent of benefit or damage resulting from the distance or
1525 proximity of the remainder, or improvements on the remainder,
1526 to the project in view of its character and probable use, including
1527 any increase or decrease in noise, fumes, vibration or other
1528 environmental degradation; and

1529 (7) cost of fencing not provided by the plaintiff and reasonably
1530 necessary to separate the land taken from the remainder.

1531 (b) If there is a partial taking of property, evidence may be
1532 received as to the value of the part taken considered as part of the
1533 whole, based on its contribution to the value of the whole, or as to
1534 its value considered independent of the whole.

1535 *Section 1106. Matters upon Which Opinion Testimony May*
1536 *Be Used.*

1537 As the basis for an opinion as to value, a valuation witness
1538 qualified under Section 1103 (a) may consider any nonconjectural
1539 matters ordinarily relied upon by experts in forming opinions as
1540 to the fair market value of property, whether or not they are
1541 admissible in evidence.

1542 *Section 1107. Sales of Subject Property.*

1543 As a basis for an opinion as to value, a valuation witness
1544 qualified under Section 1103 (a) may consider the price and other
1545 circumstances of any good faith sale or contract to sell all or part
1546 of the property sought to be taken, or all or part of any remainder
1547 that will be left after a partial taking of the property, whether the
1548 sale or contract was entered into before or after the valuation
1549 date.

1550 *Section 1108. Comparable Sales.*

1551 As a basis for an opinion as to value, a valuation witness

1552 qualified under Section 1103 (a) may consider the price and other
1553 terms and circumstances of any good faith sale or contract to sell
1554 and purchase comparable property. A sale or contract is
1555 comparable within the meaning of this section if it was made
1556 within a reasonable time before or after the valuation date and
1557 the property is sufficiently similar in the relevant market, with
1558 respect to situation, usability, improvements, and other
1559 characteristics, to warrant a reasonable belief that it is
1560 comparable to the property being valued.

1561 *Section 1109. Leases.*

1562 As a basis for an opinion as to value, a valuation witness
1563 qualified under Section 1103 (a) may consider the terms and
1564 circumstances of any lease made in good faith that included all or
1565 part of the property being valued or of comparable property
1566 whether the lease was made before or after the valuation date.

1567 *Section 1110. Capitalization of Rental Income.*

1568 As a basis for an opinion as to value, a valuation witness
1569 qualified under Section 1103 (a) may consider the actual or
1570 reasonable net rental income attributable to the property when
1571 used for its highest and best use, capitalized at a fair and
1572 reasonable interest rate.

1573 *Section 1111. Reproduction or Replacement Cost.*

1574 As a basis for an opinion as to value, a valuation witness
1575 qualified under Section 1103 (a) may consider the cost of
1576 reproducing or replacing existing improvements on the property
1577 sought to be taken which enhance its value for its highest and best
1578 use, less any depreciation resulting from physical deterioration or
1579 from functional or economic obsolescence.

1580 *Section 1112. Conditions in General Vicinity.*

1581 As a basis for an opinion as to value, a valuation witness
1582 qualified under Section 1103 (a) may consider the nature,
1583 condition, and use of properties in the general vicinity of the
1584 property being valued.

1585 *Section 1113. Matter upon Which Opinion May Not Be*
1586 *Based.*

1587 Notwithstanding the provisions of Sections 1103 to 1112, the
1588 following factors are not admissible as a basis for an opinion as to
1589 the value of property:

1590 (1) the price or other terms and circumstances of an
1591 acquisition of comparable property, where that property was or
1592 could have been acquired in that transaction under the power of

- 1593 eminent domain;
1594 (2) the price at which property was optioned, offered, or listed
1595 for purchase, sale or lease;
1596 (3) the assessed value of property for purposes of taxation;
1597 (4) an opinion as to the value of property other than the
1598 property being valued;
1599 (5) the terms and circumstances of a trade or exchange of
1600 property, and
1601 (6) except as provided in Section 1104 (5), the influence upon
1602 the value of the property being valued of an exercise of the police
1603 power or of other noncompensable damage.

1604 **ARTICLE XII**

1605 **JUDGMENT AND POSTJUDGMENT PROCEDURE**

1606 *Sec.*

1607 *1201. Contents of Judgment.*

1608 *1202. Interest on Compensation Awarded.*

1609 *1203. Interest on Judgment.*

1610 *1204. Adjustment of Taxes.*

1611 *1205. Recoverable Costs.*

1612 *1206. Crediting Amounts Paid or Withdrawn from*
1613 *Deposited Funds.*

1614 *1207. Performance of Work to Reduce Amount of*
1615 *Award.*

1616 *1208. Payment of Judgment by Plaintiff.*

1617 *1209. Order Transferring Title.*

1618 *1210. Effect of Failure to Pay Judgment.*

1619 *1211. Payment after Judgment from Funds Deposited*
1620 *with Court.*

1621 *1212. Order for Possession after Judgment.*

1622 *Section 1201. Contents of Judgment.*

1623 (a) The judgment may, and in the case of a partial taking shall,
1624 describe the proposed project in relation to the property taken,
1625 and shall:

1626 (1) describe the property condemned and declare the right of
1627 the plaintiff to take it by eminent domain;

1628 (2) recite the verdict or decision and declare that title to the
1629 property will be transferred to the plaintiff after the plaintiff has
1630 paid to the defendant, or to the court for the benefit of the
1631 defendant, the amount of compensation awarded and any

1632 additional amounts allowed;

1633 (3) describe the interest of each defendant in the property
1634 condemned, and state the amount of the award to which each
1635 defendant is entitled; and

1636 (4) determine all other questions arising from the taking,
1637 including questions relating to taxes, encumbrances, liens,
1638 rentals, insurance, or other charges.

1639 (b) If the court determines that any issue under paragraph (3)
1640 or (4) of subsection (a) cannot be tried expeditiously and that no
1641 party will be prejudiced by reserving it for later determination,
1642 the court may enter a preliminary judgment that includes the
1643 recitals required by paragraphs (1) and (2) of subsection (a),
1644 directs the plaintiff to deposit in court the amount of
1645 compensation awarded, and describes any issue reserved. A
1646 preliminary judgment so entered is appealable as to all matters
1647 and issues actually determined therein and not reserved. A
1648 supplementary judgment of apportionment determining any
1649 reserved issue shall be entered after that issue has been resolved.

1650 *Section 1202. Interest on Compensation Awarded.*

1651 (a) Except as provided in subsection (b), the judgment shall
1652 include interest at the [legal] rate [of % per year] upon the
1653 unpaid portion of the compensation awarded. The interest shall
1654 (1) commence to accrue upon the earlier of the date of valuation
1655 or date on which the plaintiff takes physical possession of the
1656 defendant's property, and (2) be calculated to the earlier of the
1657 date of payment or date of [entry] [filing] of the judgment.

1658 (b) The judgment may not include interest upon the amount
1659 represented by funds deposited by the plaintiff for the period after
1660 the date on which the deposited funds were available for
1661 withdrawal by the defendant.

1662 *Section 1203. Interest on Judgment.*

1663 The unpaid portion of the amount awarded by the judgment
1664 shall bear interest at the [legal] rate [of % per year] computed
1665 from the date of [entry] [filing] of the judgment to the date of
1666 payment. "Judgment," within the meaning of this section, means
1667 a judgment under Section 1201 (a) or a preliminary judgment
1668 under Section 1201 (b).

1669 *Section 1204. Adjustment of Taxes.*

1670 (a) The judgment shall require the plaintiff to pay to the
1671 defendant, in addition to any other amount awarded, the
1672 prorated portion of taxes paid by the defendant to any public

1673 agency properly allocable to the tax period following the earlier
1674 of (1) the date upon which the plaintiff took possession of the
1675 property condemned, or (2) the date of [entry] [filing] of the
1676 judgment.

1677 (b) If the current taxes payable on the property being
1678 condemned have not been paid before [entry] [filing] of the
1679 judgment, the court shall deduct from the award in favor of the
1680 defendant the prorated portion of the unpaid taxes properly
1681 allocable to the part of the tax period preceding the earlier of (1)
1682 the date upon which the plaintiff took possession of the property
1683 condemned, or (2) the date of [entry] [filing] of the judgment, and
1684 shall order the amount so deducted to be paid to the appropriate
1685 taxing authority.

1686 (c) After the earlier of (1) the date upon which the plaintiff
1687 took possession of the property condemned, or (2) the date of
1688 [entry] [filing] of the judgment, neither the defendant nor any
1689 property of the defendant not taken in the action is liable for
1690 payment of taxes upon, and the plaintiff is exclusively liable to
1691 the appropriate taxing authorities for all unpaid taxes relating to,
1692 the property taken, subject to any exemption, cancellation, or
1693 rebate provided by law.

1694 (d) The adjustment of taxes required by this section shall be
1695 determined by the court. Upon motion of a party or its own
1696 motion, the court may give reasonable notice to the appropriate
1697 taxing authorities and an opportunity for them to be heard with
1698 respect to the adjustment of the taxes. If the notice and
1699 opportunity to be heard are given, the court's determination is
1700 conclusive as to the respective tax liabilities of the plaintiff and
1701 defendant.

1702 (e) The term "taxes," as used in this section, includes ad
1703 valorem property taxes, ad valorem special assessment taxes, and
1704 water, sewer, or other service charges which are collected together
1705 with, or in substantially the same manner as, ad valorem taxes. It
1706 does not refer to special assessments upon benefited property that
1707 are secured by a specific lien on that property.

1708 *Section 1205. Recoverable Costs.*

1709 (a) If the judgment determines that the plaintiff has the right to
1710 take all or part of the defendant's property, the costs incurred by
1711 the defendant shall be claimed, taxed, and allowed to the
1712 defendant by the same procedure as in other civil actions, except
1713 as otherwise provided in this section.

1714 (b) If the amount of compensation awarded to the defendant by
1715 the judgment, exclusive of interest and costs, is equal to or greater
1716 than the amount specified in the last offer of settlement made by
1717 the defendant under Section 708, the court shall allow the
1718 defendant his costs under subsection (a) and in addition his
1719 litigation expenses in an amount not exceeding the greater of
1720 [] dollars or [25] percent of the amount by which the
1721 compensation awarded exceeds the amount of the plaintiff's last
1722 offer of settlement made under Section 203 or 708.

1723 (c) If the amount of compensation awarded to the defendant by
1724 the judgment, exclusive of interest and costs, is equal to or less
1725 than the amount specified in the last offer of settlement made by
1726 the plaintiff under Section 708, the defendant shall not be entitled
1727 to his costs incurred after the date of service of the offer.

1728 *Section 1206. Crediting Amounts Paid or Withdrawn from*
1729 *Deposited Funds.*

1730 (a) The judgment shall credit against the total amount awarded
1731 to the defendant any payments made before the date of [entry]
1732 [filing] of the judgment by plaintiff to the defendant as
1733 compensation for the property taken, plus any funds which the
1734 defendant withdrew from money deposited by the plaintiff.

1735 (b) If the amount to be credited against the award under
1736 subsection (a) exceeds the total amount awarded, the judgment
1737 shall require the defendant to pay the excess to the plaintiff or
1738 other person entitled thereto.

1739 *Section 1207. Performance of Work to Reduce Amount of*
1740 *Award.*

1741 (a) If the court finds that the plaintiff and defendant have
1742 entered into an agreement under which the plaintiff has
1743 completed, or has undertaken to perform, described work, or if a
1744 pretrial order required the performance of work by the plaintiff,
1745 the court may include in the judgment a determination that the
1746 plaintiff has satisfied, or may satisfy, the judgment in whole or in
1747 part by performing the work as described.

1748 (b) The provisions included in the judgment under subsection
1749 (a) shall describe or incorporate the terms and conditions of the
1750 agreement or pretrial order, and to the extent the agreement or
1751 order fails to provide therefor shall include requirements relating
1752 to:

1753 (1) the location and nature of the work and the time for its

1754 commencement and completion; and

1755 (2) the amount of compensation awarded which is or will be
1756 satisfied by performance of the work by the plaintiff, rather than
1757 by payment in money together with any proper adjustments in the
1758 amount of interest allowable on the amount awarded.

1759 (c) For good cause, the court may require the plaintiff to
1760 deposit funds with the court, or to execute and file with the clerk
1761 a bond with sureties approved by the court, in an amount not less
1762 than the estimated cost of the work, to guarantee its faithful and
1763 timely performance; and the court may impose other reasonable
1764 terms and conditions including a reservation of continuing
1765 jurisdiction to assure that the work will be properly performed in
1766 accordance with the judgment.

1767 *Section 1208. Payment of Judgment by Plaintiff.*

1768 (a) Within [30] days after [entry] [filing] of the judgment, or
1769 within [10] days after the judgment has become final, whichever is
1770 later, the plaintiff shall pay the full amount required by the
1771 judgment after crediting all amounts withdrawn by the defendant
1772 after judgment from funds on deposit. The court for good cause
1773 may extend the time within which payment must be made for an
1774 additional period not exceeding [90] days.

1775 (b) Payment may be made by the plaintiff by paying money
1776 personally to the defendant, or to the legal representative of the
1777 defendant, taking a receipt therefor and filing a copy with the
1778 court; or by depositing the amount of the award with the court
1779 for the defendant. By making a deposit under this section, the
1780 plaintiff does not waive its right to review.

1781 (c) Within [ten] days after a deposit of the award under
1782 subsection (b), the plaintiff shall give written notice thereof to
1783 each defendant for whom a disclaimer is not on file and who has
1784 not received personal payment in full. If the plaintiff fails to give
1785 the prescribed notice to a defendant entitled thereto, interest shall
1786 be added to that defendant's undistributed share of any funds on
1787 deposit with the court for the purpose of payment, at the [legal]
1788 rate [of % per year], from the date of deposit of the award
1789 under subsection (b) to the date on which the written notice is
1790 served, or to the date on which the defendant actually receives
1791 from the clerk of court the amount to which he is entitled under
1792 the judgment, whichever is earlier. The court may make any
1793 proper orders reasonably necessary to enforce the plaintiff's
1794 obligation to pay interest as provided in this subsection.

1795 *Section 1209. Order Transferring Title.*

1796 (a) Upon proof that the plaintiff has fully satisfied the
1797 judgment, the court shall make an order transferring to and
1798 vesting in the plaintiff the title to property taken.

1799 (b) The transfer order shall:

1800 (1) describe the property taken, recite or incorporate by
1801 reference the provisions of the judgment, and set forth the court's
1802 determination that it has been satisfied; and

1803 (2) declare that title to the defendant's property as described
1804 therein is transferred to and vested in the plaintiff upon the
1805 effective date of the order.

1806 (c) The party obtaining the transfer order shall promptly serve
1807 a copy of the order upon each party [and may file a copy for
1808 record in the place and manner provided by law for the
1809 recordation or registration of deeds and conveyances.]

1810 *Section 1210. Effect of Failure to Pay Judgment.*

1811 (a) If the plaintiff fails to make full payment of the judgment,
1812 or of the full amount awarded for any separate item or parcel of
1813 property described therein, within the time allowed under Section
1814 1208, the defendant:

1815 (1) may treat the failure to make payment as an abandonment
1816 of the condemnation action with respect to the property for which
1817 payment has not been made, and may move to vacate the
1818 judgment and for a dismissal under Section 1301; or

1819 (2) may apply to the court for enforcement of the judgment by
1820 any appropriate enforcement process authorized by law,
1821 [including levy of execution, foreclosure of a vendor's lien on the
1822 property taken, or issuance of a mandatory injunction or writ of
1823 mandamus to compel payment].

1824 (b) In determining questions arising under subsection (a), the
1825 court may make appropriate orders to adjust the rights of the
1826 parties, including orders with respect to the possession and use of
1827 the property and the performance of any work thereon, and may
1828 award damages, interest, and costs to the defendant as justice
1829 requires.

1830 *Section 1211. Payment after Judgment from Funds Deposited*
1831 *with Court.*

1832 (a) After the [entry] [filing] of the judgment, stating the amount
1833 of the award to which a defendant is entitled, and subject to the
1834 limitations of this section, that defendant may apply to the court
1835 for payment to him of the amount to which he is entitled under

1836 the judgment from funds deposited with the court by the plaintiff,
1837 whether the deposit was made before or after judgment, and
1838 whether or not the judgment has been appealed or a motion for
1839 new trial or to vacate or set aside the judgment has been made.

1840 (b) The court shall direct that payment be made for the
1841 defendant of the amount to which he is entitled under the
1842 judgment, less any amount previously paid to him as shown by
1843 receipts filed with the court, upon the filing by the defendant of a
1844 receipt. Acceptance by the defendant of the money waives all the
1845 defendant's objections and defenses in the action except his claim
1846 to greater compensation.

1847 (c) For good cause shown, the court may permit payment
1848 under this section before the date on which the judgment is final
1849 upon condition that the defendant provide security for the
1850 repayment of any amount received by him which exceeds the
1851 amount to which he is finally determined to be entitled.

1852 (d) A defendant who receives money under this section in
1853 excess of the amount to which he is finally determined to be
1854 entitled shall repay the excess to the plaintiff, or to any other
1855 party entitled thereto, without interest.

1856 (e) If the defendant fails to pay any amount required by the
1857 judgment within [30] days after the judgment becomes final, the
1858 court on motion may enforce payment out of the security, if any,
1859 provided under subsection (c), or issue any appropriate process.

1860 *Section 1212. Order for Possession after Judgment.*

1861 (a) At any time after judgment, the plaintiff may apply to the
1862 court for an order of possession. The application may be granted
1863 whether or not the judgment has been appealed or a motion for
1864 new trial or to vacate or set aside the judgment has been made.

1865 (b) The court shall authorize the plaintiff to take possession of
1866 the property if:

1867 (1) the judgment determines that the plaintiff is entitled to take
1868 the property; and

1869 (2) the plaintiff has paid the full amount required by the
1870 judgment in the manner provided by Section 1208(b).

1871 (c) The court shall specify the date after which the plaintiff is
1872 authorized to take possession of the property. Unless the
1873 defendant consents in writing to an earlier date, possession may
1874 not be taken earlier than [ten] days after the date on which the
1875 order is served or 90 days after notice to terminate occupancy was
1876 given under Section 205 if that section is applicable, whichever is

1877 later. The court may enforce the order for possession by an
1878 appropriate writ or proceeding, including contempt.

1879 (d) The plaintiff does not abandon or waive the right to appeal
1880 from the judgment, move for a new trial, or vacate or set aside the
1881 judgment, by making application for or taking possession under
1882 this section.

1883

ARTICLE XIII

1884

DISMISSAL AND ABANDONMENT

1885 *1301. Involuntary Dismissal.*

1886 *1302. Voluntary Dismissal.*

1887 *1303. Award of Litigation Expenses.*

1888 *1304. Restitution of Property and Damages.*

1889 *Section 1301. Involuntary Dismissal.*

1890 On motion of the defendant, the court shall dismiss the action
1891 in whole or in part, as justice requires, if:

1892 (1) upon sustaining a preliminary objection to the plaintiff's
1893 complaint, the court determines that a dismissal is required;

1894 (2) the plaintiff, by amending the complaint, so changes the
1895 extent, scope, or nature of the property sought to be taken that a
1896 dismissal of the action is required as to the superseded portion of
1897 the original action;

1898 (3) the plaintiff has unjustifiably failed to exercise reasonable
1899 diligence in prosecuting the action;

1900 (4) the plaintiff has unjustifiably failed to exercise reasonable
1901 diligence in prosecuting the action;

1902 (4) the plaintiff has failed or refused to comply with an order
1903 for deposit made under Section 601 or an order to increase the
1904 amount on deposit made under Section 603 (c); or

1905 (5) the plaintiff has failed to pay the full amount required by
1906 the judgment within the time allowed.

1907 *Section 1302. Voluntary Dismissal.*

1908 (a) The court may dismiss the action in whole or in part upon
1909 motion of the plaintiff at any time prior to payment of the
1910 judgment. In its order of dismissal, the court may impose any
1911 conditions that are just and equitable, including a requirement of
1912 restitution of property or money.

1913 (b) The plaintiff's motion to dismiss the action may be denied
1914 if the court determines, after noticed hearing, that because of the
1915 condemnation action the defendant has substantially changed his
1916 position to his detriment.

1917 *Section 1303. Award of Litigation Expenses.*

1918 (a) The court shall award the defendant his litigation expenses,
1919 in addition to any other amounts authorized by law, if the action
1920 is wholly or partly dismissed for any reason.

1921 (b) If the scope of the property to be taken is reduced as the
1922 result of (1) a partial dismissal, (2) a dismissal of one or more
1923 plaintiffs, or (3) a final judgment determining that the plaintiff
1924 cannot take part of the property originally sought to be taken,
1925 the court shall award the defendant the portion of his litigation
1926 expenses attributable to the property within the scope of the
1927 reduction.

1928 (c) Costs and litigation expenses authorized by this section
1929 may be claimed, taxed, and awarded under the same procedures
1930 that apply to costs in other civil actions.

1931 *Section 1304. Restitution of Property and Damages.*

1932 If the action is dismissed for any reason, and the defendant has
1033 vacated the property under an order of possession or in
1934 reasonable contemplation of its taking by the plaintiff, the court,
1935 upon demand of the defendant, shall order the plaintiff to (1)
1936 deliver possession of the property to the defendant or other
1937 person entitled thereto, and (2) pay damages to the defendant as
1938 justice requires, including damages for any injury to or
1939 impairment of the value of the property not within the reasonable
1940 control of the defendant.

1941 **ARTICLE XIV**
1942 **RELOCATION ASSISTANCE**

1943 *Sec.*

1944 1401. *Declaration of Policy.*

1945 1402. *Definitions.*

1946 1403. *Moving and Related Expenses.*

1947 1404. *Replacement Housing for Homeowners.*

1948 1405. *Replacement Housing for Tenants and Certain Others.*

1949 1406. *Relocation Assistance Advisory Program.*

1950 1407. *Replacement Housing Prerequisite to Requiring Person*
1951 *to Move.*

1952 1408. *Implementing Regulations.*

1953 1409. *Fund Availability.*

1954 1410. *Administration.*

1955 *1411. Payments Not Income or Resources.*

1956 *1412. Review of Application of Aggrieved Person.*

1957 *Section 1401. Declaration of Policy.*

1958 (a) The purpose of this Article is to establish a uniform policy
1959 for the fair and equitable treatment of persons displaced by public
1960 and private condemnors in order that they will not suffer
1961 disproportionate injuries as a result of programs designed for the
1962 benefit of the public as a whole. All costs under this Article are
1963 part of the costs and expenses of the project or improvement
1964 which caused the displacement.

1965 (b) If, as a condition of the eligibility of a condemnor for
1966 federal assistance of any kind, payments are required by federal
1967 law in amounts greater than or under circumstances not
1968 authorized by this Article, the condemnor shall comply with the
1969 requirements of federal law instead of this Article.

1970 *Section 1402. Definitions.*

1971 As used in this Article:

1972 (1) "Displaced person" means a person who moved from real
1973 property, or who moves his personal property from real property:

1974 (i) as a result of the acquisition of the real property in whole or
1975 in part by a condemnor;

1976 (ii) as a result of a written order by the acquiring condemnor to
1977 vacate the real property for a program or project undertaken by
1978 it; or

1979 (iii) solely for the purposes of Sections 1403(a) and (b) and
1980 Section 1406, as a result of the acquisition of, or as the result of
1981 the written order of the acquiring condemnor to vacate other real
1982 property, on which the person conducts a business or farm
1983 operation, for the program or project.

1984 (2) "Business" means any lawful activity, except a farm
1985 operation, conducted primarily:

1986 (i) for the purchase, sale, exchange, lease, or rental of personal
1987 and real property, and for the manufacture, processing, or
1988 marketing of products, commodities, or any other personal
1989 property;

1990 (ii) for providing services to the public;

1991 (iii) by a nonprofit organization; or

1992 (iv) solely for the purposes of Section 1403(a) for assisting in
1993 the purchase, sale, resale, manufacture, processing, or marketing
1994 of products, commodities, personal property, or services by the
1995 erection and maintenance of an outdoor advertising display,

1996 whether or not such display is located on the premises on which
1997 any of above activities are conducted.

1998 (3) "Mortgage" includes any form of lien or security interest
1999 given to secure advances on or the unpaid purchase price of, real
2000 property, together with the credit instruments, if any, secured
2001 thereby.

2003 *Section 1403. Moving and Related Expenses.*

2004 (a) Whenever the acquisition of real property for public use by
2005 a condemnor results in the displacement of any person, the
2006 condemnor shall pay the displaced person as part of the cost
2007 acquisition:

2008 (1) his actual reasonable expenses in moving himself, his
2009 family, business, farm operation, or other personal property to a
2010 new location, not exceeding the cost of moving a reasonable
2011 distance;

2012 (2) his actual direct losses of tangible personal property as a
2013 result of moving or discontinuing a business or farm operation,
2014 not exceeding an amount equal to the reasonable expenses that
2015 would have been required to relocate the property within a
2016 reasonable distance; and

2017 (3) his actual reasonable expenses in searching for a replace-
2018 ment business or farm.

2019 (b) The condemnor shall pay to a displaced person eligible for
2020 payments under subsection (a), who moves from a dwelling and
2021 who elects to accept the payments authorized by this subsection
2022 in lieu of the payments authorized by subsection (a), a reasonable
2023 moving expense allowance, but not more than \$300, and in
2024 addition a dislocation allowance of \$200.

2025 (c) The condemnor shall pay to a displaced person eligible for
2026 payments under subsection (a), who moves or discontinues his
2027 business or farm operation and who elects to accept the payment
2028 authorized by this subsection in lieu of the payment authorized by
2029 subsection (a), a fixed relocation payment in an amount equal to
2030 the average annual net earnings of the business or farm operation,
2031 but the payment shall be not less than \$2,500 nor more than
2032 \$10,000. [In the case of a business, payment shall be made under
2033 this subsection only if the business (1) cannot be relocated
2034 without a substantial loss of patronage, and (2) is not a part of a
2035 commercial enterprise having at least one other establishment not
2036 being acquired which is engaged in the same or similar business.]
2037 For purposes of this subsection, "average annual net earnings"

2038 means one-half of any net earnings of the business or farm
2039 operation, before federal, state, and local income taxes, during
2040 the two taxable years immediately preceding the taxable year in
2041 which the business or farm operation moves from the real
2042 property being acquired or during any other more equitable
2043 period for establishing earnings, including any compensation
2044 paid by the business or farm operation to the owner, his spouse,
2045 or his dependents during the two-year or other period.

2046 *Section 1404. Replacement Housing for Homeowners.*

2047 (a) In addition to payments required by Section 1403, the
2048 condemnor shall pay an amount not exceeding \$15,000 to any
2049 person displaced from a dwelling actually owned and occupied by
2050 him for not less than 180 days before the initiation of negotiations
2051 for acquisition of the property.

2052 (b) The additional payment required by subsection (a) shall
2053 include the following elements:

2054 (1) the amount, if any, which when added to the acquisition
2055 cost of the dwelling acquired, equals the reasonable cost of a
2056 comparable replacement dwelling that is a decent, safe, and
2057 sanitary dwelling adequate to accommodate the displaced person,
2058 reasonably accessible to public services and places of employment
2059 and available on the private market;

2060 (2) the amount, if any, that will compensate the displaced
2061 owner for any increased interest costs he is required to pay for
2062 financing the acquisition of a comparable replacement dwelling.
2063 This amount shall be paid only if the dwelling acquired was
2064 encumbered by a mortgage which was a valid lien on the dwelling
2065 for not less than 180 days before initiation of negotiations for
2066 acquisition of the dwelling. The amount shall be equal to the
2067 excess in the aggregate interest and other debt service costs of that
2068 amount of the principal of the mortgage on the replacement
2069 dwelling which is equal to the unpaid balance of the mortgage on
2070 the acquired dwelling, reduced to discounted present value. The
2071 discount rate shall be the prevailing interest rate paid on savings
2072 deposits by commercial banks in the community in which the
2073 replacement dwelling is located; and

2074 (3) reasonable expenses incurred by the displaced person for
2075 evidence of title, recording fees, and other closing costs incident
2076 to the purchase of the replacement dwelling, but not including
2077 prepaid expenses.

2078 (c) The additional payment authorized by this section shall be

2079 made only to a displaced owner who purchases or enters into a
2080 contract for rehabilitation or construction of a decent, safe, and
2081 sanitary replacement dwelling which is to be occupied not later
2082 than the end of the one year period beginning on the date on
2083 which he receives final payment of the award or proceeds of the
2084 acquired dwelling, or on the date on which he moves from the
2085 acquired dwelling, whichever is later.

2086 *Section 1405. Replacement Housing for Tenants and Certain*
2087 *Others.*

2088 (a) In addition to payments required by Section 1403, the
2089 condemnor, as part of the costs of acquisition of real property
2090 improved with a dwelling, shall make a payment to or for any
2091 displaced person not eligible to receive a payment under Section
2092 1404 who is displaced from any dwelling which was actually and
2093 lawfully occupied by the displaced person for not less than 90
2094 days before the initiation of negotiations for acquisition of the
2095 property.

2096 (b) The payment shall be either:

2097 (1) the additional amount, in excess of his current rent,
2098 reasonably necessary to enable the displaced person to lease or
2099 rent, for a period not to exceed four years, a decent, safe and
2100 sanitary dwelling adequate to accommodate him in areas not
2101 generally less desirable in regard to public utilities and public,
2102 commercial, and farming facilities, and reasonably accessible to
2103 his place of employment, not exceeding \$4,000; or

2104 (2) the amount necessary to enable the displaced person to
2105 make a down payment, including incidental expenses described in
2106 Section 1404 (b) (3), on the purchase of a decent, safe, and
2107 sanitary dwelling adequate to accommodate him in areas not
2108 generally less desirable in regard to public utilities, and public,
2109 commercial and farming facilities, not exceeding \$4,000, but if the
2110 amount exceeds \$2,000, the displaced person must match any
2111 amount exceeding \$2,000 in making the down payment.

2112 *Section 1406. Relocation Assistance Advisory Program.*

2113 (a) A condemnor shall provide a relocation assistance advisory
2114 program to aid any person, business, or farm operation displaced
2115 because of its acquisition of real property. If the condemnor
2116 determines that any person occupying property immediately
2117 adjacent to the real property acquired is caused substantial
2118 economic injury because of the acquisition, it may offer that
2119 person relocation assistance advisory services under the program.

2120 (b) A public entity may establish local relocation assistance
2121 offices to assist in obtaining replacement housing and other
2122 facilities for persons who find it is necessary to relocate their
2123 dwellings, businesses, or farm operations because of the
2124 acquisition of real property.

2125 (c) Relocation assistance advisory programs shall include
2126 measures, facilities or services necessary or appropriate in order
2127 to:

2128 (1) determine the need, if any, of displaced persons for
2129 relocation assistance;

2130 (2) provide current and continuing information on the
2131 availability, prices and rentals, or comparable decent, safe and
2132 sanitary sale and rental housing for displaced persons, and of
2133 comparable locations for displaced business or farm operations;

2134 (3) assure, to the extent reasonably feasible, that within a
2135 reasonable time before displacement there will be available in
2136 areas not generally less desirable in regard to public utilities and
2137 public and commercial facilities, and at rents or prices within the
2138 financial means of the families of individuals displaced, decent,
2139 safe, and sanitary dwellings, equal in number to the number of,
2140 and available to, displaced persons who require those dwellings
2141 and reasonably accessible to their places of employment;

2142 (4) assist a person displaced from his business or farm
2143 operation in obtaining and becoming established in a suitable
2144 replacement location;

2145 (5) supply information concerning federal, state and local
2146 housing programs, disaster loan programs, and other federal,
2147 state or local programs offering assistance to displaced persons;

2148 (6) provide other advisory services to displaced persons in
2149 order to minimize hardships to them in adjusting to relocation;
2150 and

2151 (7) secure, to the greatest extent practicable, the coordination
2152 of its relocation assistance program with the project work
2153 necessitating the displacement and with other planned or
2154 proposed activities of public entities in the community on nearby
2155 areas which may affect the implementation of its relocation
2156 assistance program.

2157 *Section 1407. Replacement Housing Prerequisite to Requiring*
2158 *Person to Move.*

2159 No person shall be required to move from his dwelling because
2160 of its acquisition by a condemnor, unless replacement housing, as

2161 described in Section 1406 (c) (3) is available.

2162 *Section 1408. Implementing Regulations.*

2163 The State [Department of Administration] shall adopt
2164 regulations to assure that:

2165 (1) the payments and assistance authorized or required by this
2166 Article shall be administered in a fair and reasonable manner and
2167 as uniformly as practicable;

2168 (2) a displaced person who makes proper application for a
2169 payment authorized by this Article will be paid by the condemnor
2170 promptly after a move, or, in hardship cases, will be paid in
2171 advance; and

2172 (3) any person aggrieved by a determination of a public entity
2173 as to eligibility or lack of eligibility for, or as to the amount of,
2174 any relocation assistance service or payment authorized by this
2175 Article, may have his application reviewed by the [governing
2176 body or other head of the public entity] [Department of
2177 Administration].

2178 *Section 1409. Fund Availability.*

2179 (a) Funds appropriate or otherwise available to a condemnor
2180 for the acquisition of property for a particular program or project
2181 shall be available to, and the condemnor may, obligate and expend
2182 those funds to carry out the provisions of this Article in
2183 connection with the program or project. Expenditures under this
2184 section are costs of the program or project.

2185 (b) If comparable replacement housing is not available and the
2186 condemnor determines that the required housing cannot
2187 otherwise be made available the condemnor may obligate and
2188 expend funds authorized for the project for which the property is
2189 being acquired to provide the housing.

2190 *Section 1410. Administration.*

2191 In order to prevent unnecessary expense and duplication of
2192 functions and to promote uniform and effective administration of
2193 public relocation assistance programs for displaced persons, a
2194 condemnor may contract with any public entity, individual, firm,
2195 association or corporation for relocation assistance services
2196 required by this Article, carry out its obligations under his
2197 Article by providing relocation assistance in whole or in part by
2198 its own personnel, or utilize the services of state or local housing
2199 agencies or other agencies having experience in the administra-
2200 tion or conduct of similar relocation or housing assistance
2201 activities.

2202 *Section 1411. Payments Not Income or Resources.*

2203 Payments received by a displaced person under this Article
2204 shall not be considered as income resources for the purpose of
2205 (1) determining the eligibility or extent of eligibility of, or the
2206 amount of aid to be given to, any person for public assistance
2207 purposes under any law of this State, or (2) applying any state [or
2208 municipal] income tax, corporation tax, or other tax law of this
2209 State.

2210 *Section 1412. Review of Application of Aggrieved Person.*

2211 After exhaustion of administrative remedies, a determination
2212 by a condemnor as to eligibility or lack of eligibility for, or as to
2213 the extent of, any relocation assistance service or payment
2214 authorized by this Article, may be reviewed by a court of
2215 competent jurisdiction and modification set aside, if it is found to
2216 be arbitrary, unreasonable, or an abuse of discretion.

2217

ARTICLE XV

2218

ARBITRATION OF COMPENSATION

2219

2220 *1501. Arbitration of Compensation Authorized.*

2221 *1502. Enforceability of Agreement.*

2222 *1503. Timing of Arbitration.*

2223 *1504. Effect of Pending Condemnation Action.*

2224 *1505. Absence of Concurrent Condemnation Action.*

2225 *1506. Arbitration Procedure.*

2226 *1507. Abandonment of Acquisition.*

2227 *1508. Recordation of Agreement.*

2228 *Section 1501. Arbitration of Compensation Authorized.*

2229 (a) A condemnor and a condemnee or two or more
2230 condemnees may enter into and comply with the terms of an
2231 agreement in conformity with this Article for the arbitration of
2232 any issue relating to the amount or the apportionment of
2233 compensation for the taking of property.

2234 (b) An agreement to arbitrate does not constitute and shall not
2235 be construed as a waiver of or excuse for noncompliance with
2236 any requirement of Article II or III relating to the acquisition of
2237 property except to the extent expressly provided in the agree-
2238 ment.

2239 *Section 1502. Enforceability of Agreement.*

2240 Except as specifically provided in this Article, an agreement to
2241 arbitrate under Section 1501 has the same effect, and an

2242 arbitration thereunder may be conducted, and the award may be
2243 judicially confirmed, in conformity with the same procedures, as
2244 in other arbitrations under the law of this State. To the extent
2245 that this Article and any agreement in conformity with it are
2246 inconsistent with any other law, this Article prevails.

2247 *Section 1503. Timing of Arbitration.*

2248 An arbitration agreement under this Article may be made and
2249 carried into effect either before or after a condemnation action
2250 has been commenced. The agreement does not waive or restrict
2251 the right to commence and prosecute a condemnation action,
2252 including the taking of possession before judgment, except to the
2253 extent expressly provided in the agreement.

2254 *Section 1504. Effect of Pending Condemnation Action.*

2255 If a condemnation action has been commenced and is pending
2256 between the parties to an arbitration agreement under this
2257 Article:

2258 (1) a petition, motion, or other proceeding thereafter initiated
2259 in connection with the arbitration shall be filed in and determined
2260 by the court in the condemnation action;

2261 (2) the court in the condemnation action may stay the
2262 determination of an issue of compensation in the action until
2263 arbitration pursuant to the agreement has been concluded; and

2264 (3) the total or apportioned amounts of compensation as
2265 determined by the arbitration award and confirmed by the court
2266 shall be included in the judgment of condemnation as the amount
2267 of compensation for the property.

2268 *Section 1505. Absence of Concurrent Condemnation Action.*

2269 In the absence of a pending condemnation action relating to
2270 the property, a petition, motion, or other proceeding initiated in
2271 connection with arbitration pursuant to an agreement under this
2272 Article shall be filed in and determined by a court that would
2273 have both jurisdiction and proper venue of the condemnation
2274 action if it had been commenced immediately prior thereto.
2275 Unless the agreement for arbitration otherwise provides, the total
2276 or apportioned amounts of compensation as determined by the
2277 arbitration award and confirmed by the court shall be entered as
2278 a judgment with the same effect and subject to the same terms and
2279 conditions as a judgment of condemnation of the property.

2280 *Section 1506. Arbitration Procedure.*

2281 Unless the arbitration agreement provides otherwise, the
2282 conduct of the arbitration shall be subject to the following rules:

2283 (1) The locale for the arbitration is the county in which the
2284 subject property, or the major portion of that property, is located.

2285 (2) The law of this State relating to the criteria for ascertaining
2286 just compensation and damages, and the elements thereof, shall
2287 be applied.

2288 (3) The arbitration tribunal shall be the judge of the relevancy
2289 and materiality of the evidence offered, and conformity to the
2290 legal rules of evidence shall not be required.

2291 (4) The amount of compensation determined by the arbitra-
2292 tion award must be within the range of the evidence presented by
2293 the parties.

2294 (5) The condemnor shall pay the compensation of and all
2295 expenses and fees incurred by the arbitrators.

2296 *Section 1507. Abandonment of Acquisition.*

2297 (a) Subject to the requirements of subsection (b), an arbitra-
2298 tion under this Article may specify the terms and conditions, if
2299 any, under which the condemnor may abandon acquisition of the
2300 property.

2301 (b) Unless the arbitration agreement expressly waives the
2302 property owner's right to reimbursement, in the event of
2303 abandonment of acquisition after an arbitration agreement has
2304 been entered into, he is entitled to recover from the condemnor:

2305 (1) the same litigation expenses that would be recoverable
2306 upon dismissal of an action for the acquisition of the property;
2307 and

2308 (2) all other expenses, not included in recoverable litigation
2309 expenses, reasonably and necessarily incurred by him in
2310 preparation for and in participating in the arbitration and in
2311 judicial proceedings in connection with the arbitration, including
2312 reasonable attorney, appraisal, and engineering fees.

2313 (c) If abandonment of acquisition occurs after the rendition of
2314 an award in the arbitration proceedings, the amount of the
2315 expenses payable under this section shall be determined as an
2316 additional issue in the arbitration, unless the arbitration
2317 agreement expressly provides otherwise. If the abandonment
2318 occurs before the rendition of the award, the amount shall be
2319 determined by the court in a condemnation action, if one is
2320 commenced, or in an independent action brought against the
2321 condemnor.

2322 *Section 1508. Recordation of Agreement.*

2323 (a) An agreement under this Article, or a memorandum

2324 summarizing its terms and describing the subject property, after
2325 being executed and acknowledged by the parties, may be
2326 recorded, or rerecorded, in the same manner and with the same
2327 effect as a conveyance of real property.

2328 (b) The record of the agreement or summary of agreement
2329 ceases to be notice to any person for any purpose after two years
2330 following the date of recordation or rerecordation under
2331 subsection (a).

2332 **ARTICLE XVI**
2333 **EFFECTIVE DATE AND REPEALER**

2334 *1601. Time of Taking Effect.*

2335 *1602. Application.*

2336 *1603. Uniformity of Application and Construction.*

2337 *1604. Severability.*

2338 *1605. Repealer.*

2339 *Section 1601. Time of Taking Effect.*

2340 This Code shall take effect July 1, 1976.

2341 *Section 1602. Application.*

2342 (a) Articles I through V of this Code apply only to
2343 condemnation actions commenced on or after its effective date.

2344 (b) Articles I and Articles VI through XV of this Code apply to
2345 the fullest extent practicable to pending condemnation actions
2346 commenced before its effective date with respect to issues on
2347 which a judgment has not been entered, and with respect to issues
2348 that are retried on or after its effective date pursuant to an order
2349 of a trial or appellate court.

2350 (c) In any condemnation action in which an appeal or a motion
2351 to modify or vacate the verdict or judgment, or to grant a new
2352 trial, was pending on the effective date of this Code, the law
2353 applicable before the effective date of this Code, governs the
2354 determination of the appeal or motion.

2355 *Section 1603. Uniformity of Application and Construction.*

2356 This Code shall be applied and construed as to effectuate its
2357 general purpose to make uniform the law with respect to the
2358 subject of this Code among states enacting it.

2359 *Section 1604. Severability.*

2360 If any provision of this Code or application thereof to any
2361 person or circumstance is held invalid, the invalidity does not
2362 affect other provisions or applications of the Code that can be

2363 given effect without the invalid provision or application, and to
2364 this end the provisions of this Code are severable.

2365 *Section 1605. Repealer.*

2366 The following acts and all other acts and parts of acts
2367 inconsistent with this Code are hereby repealed: [Here should
2368 follow the acts to be specifically repealed, including any acts
2369 regulating the procedure for condemnation actions.]

We do not recommend House bill 3752.

House bill 3752 is one of many “uniform” laws which are circulated throughout the United States from time to time by research organizations with official or unofficial sponsorship. House bill 3752 is in no sense a proposition that has been tailored for use in this Commonwealth. We have contacted a prominent member of the drafting committee which prepared this Uniform Eminent Domain Code and have been informed that the philosophy underlying the model code includes the assumption that the field of eminent domain law is complex and specialized and should be “simplified.”

It was the aim of the committee which drafted this model to conform the entire procedure to the Federal Rules of Civil Procedure and to the Federal Acquisitions Policy Act of 1970.

We are also advised that it was not anticipated by the drafting committee that the model code was to be adopted in toto by those jurisdictions in which legislative consideration was pending. It was expected, however, that the main philosophy of the bill, which invokes the judicial process more immediately and extensively than is the case under existing Massachusetts law, would be adopted.

Present Eminent Domain Law in Massachusetts Procedure Under G.L. Chapter 79

In Massachusetts, the vast bulk of eminent domain proceedings are carried out under the provisions of General Laws Chapter 79. This chapter of the General Laws was designed to provide a uniform procedure for the exercise of the power of eminent domain whether this power was exercised at the state level, the county level, the municipal level, or by public or even private corporations which enjoy the privilege of taking private property for public use.

The Massachusetts procedure is political in nature. In the first instance, a political body acting in conformity with law adopts an order of taking which describes the land to be taken and the interest to be taken from the owner. When this order is filed at the Registry of Deeds, the taking is complete. Our present law requires that an award of damages must be made, that certain moving costs be paid and that appraisals of the value of the land taken must be made. Since 1959, a pro tanto payment of damages must be tendered to the person whose land is taken. We thus see that in our law (under Chapter 79) there is no necessity to obtain the approval of the court in order to exercise the power of eminent domain.

The measure of damages for the taking of land is the fair market value at the time of the taking. This value is what a willing buyer would pay to a willing seller, assuming that neither was under any compulsion to conclude the sale.

When the person whose land is taken determines that he has not been offered fair market value for his interest, such person has a right under Section 14 of Chapter 79 to file a petition for the assessment of such damages by the Superior Court in the county where the land is located.

The present practice is for such cases to be tried first before a Superior Court judge, and then (unless a settlement is effected) before a jury of twelve.

Procedure Under G.L. Chapter 80A

Although the vast majority of cases in Massachusetts are conducted under the provisions of Chapter 79, Chapter 80A provides an alternate method. Under this alternate procedure, the political body adopts an order of taking by eminent domain and then, *within ten days* from the recording of the order in the Registry of Deeds, files a petition in the Superior Court to:

1. establish the right to make the taking;
2. assess any special benefits involved; and
3. determine the amount of damages to be paid.

The portion of Chapter 80A which is most controversial is Section 11 which provides:

The board may at any time before final judgment of condemnation abandon the proposed improvement and discontinue the proceedings, in which case all action taken thereun-

der and under the proceedings for the laying out or establishment of such improvement shall become void; but in such case, or in case the petition shall be dismissed on motion of a party respondent under section ten, any person who has suffered damage or loss or been put to expense by the proceedings shall be entitled to recover indemnity in full by order of the court and for which execution shall issue. In case of abandonment or dismissal as aforesaid, the clerk of the court shall forthwith transmit for record to every registry of deeds designated in the petition as provided in section four a certificate that all proceedings in relation to such improvement have been discontinued or dismissed. At any time after the right of the petitioner to take the property described in the order for the purpose stated therein and to assess betterments therefor has been established, if it shall be made to appear that all laws requiring appropriations of money, to be raised by loan or otherwise, in cases of the taking of land by eminent domain, in so far as applicable, have been complied with, the court shall on motion of the petitioner enter an interlocutory judgment of condemnation, which shall have the same effect as a final judgment of condemnation, except with respect to compensation, damages and assessments for benefits, and the proceedings shall continue as herein provided with respect to compensation, damages, and assessments; but the petitioner shall not thereafter have the right to discontinue the proceedings.

As is demonstrated by this section, the taking authority can merely abandon the whole procedure thereby leaving the parties affected with the task of proving that they were damaged or put to expense. Neither the taking authorities nor the public at large has ever been very enthusiastic about this 1929 legislation.

Effect of the Proposed Code Upon Existing Eminent Domain Law in Massachusetts

The effect of House bill 3752 would be to repeal the procedure under Chapter 79, to transform the entire eminent domain process into a judicial procedure and to adopt all of the undesirable features of Chapter 80A (see ARTICLE XIII).

The Superior Court does not now have the capacity to deal effectively even with those eminent domain cases which are con-

tested and involve huge sums as damages. The Commonwealth and various political subdivisions pay large sums in interest, often in the hundred thousand dollar category, because of the delay in eminent domain proceedings in the courts.

Because federal funds may be involved in various land acquisition programs where the amount of land damages cannot be agreed upon by the taking authority and the owners, it is not uncommon to have a double trial in a land damage case; one before a Superior Court judge and another before a jury. One whose land is taken is entitled to a trial by jury on the issue of damages. No person can lose his property to the government without due process of law and just compensation.

We cannot recommend the imposition of further burdens on the Superior Court such as would be called for by this model code. Nor do we think that a judge is necessarily the officer of the state who should be the one to make a decision as to whether or not, in the first instance, the public good requires the taking of property. We conceive that this power is more legislative than judicial and that the courts should intervene only where there is a demonstration that the power has been abused or exercised in an unlawful manner.

Further Negative Aspects

Although one of the purposes of the model code is to encourage and expedite eminent domain by voluntary negotiations, there are at least thirty (30) instances where resort may be made to the courts for determination of intermediate problems arising during the process.

An expert opinion as to value can be given by a person under the model code who is qualified by "knowledge, skill, experience, training, *or education* to express an opinion as to the value of the property." (Section 1103). In Massachusetts it is doubtful that a person would qualify by education alone.

Positive Aspects

There are some portions of the model code which could form the basis for amendments to General Laws Chapter 79 and these include:

Section 203. Offer to Purchase at Full Appraisal Value.

(a) Before initiating negotiations for the purchase of property, the condemnor shall establish an amount which it be-

lieves to be just compensation therefor and promptly shall submit to the owner an offer to acquire the property for the full amount so established. The amount shall not be less than the condemnor's approved appraisal of just compensation for the property.

(c) The condemnor shall provide the owner of the property with a written appraisal, if one has been prepared, or if one has not been prepared, with a written statement and summary, showing the basis for the amount it established as just compensation for the property. If appropriate, the compensation for the property to be acquired and for the damages to remaining property shall be separately stated.

In connection with Section 203(c) we would not support any system of oral appraisals. A written appraisal (or more than one) must be prepared.

Section 904. "No party has the burden of proof on the issue of the amount of compensation."

This is something that might well be adopted in our existing Eminent Domain structure. It should be noted that invariably judges charge the jury that the burden of proof in establishing fair market value rests on the owner of the property. This concept does not seem to have objective validity.

Section 1016. Loss of Goodwill.

(a) In addition to fair market value determined under Section 1004, the owner of a business conducted on the property taken, or on the remainder if there is a partial taking, shall be compensated for loss of goodwill only if the owner proves that the loss (1) is caused by the taking of the property or the injury to the remainder, (2) cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill; (3) will not be included in relocation payments under Article XIV, and (4) will not be duplicated in the compensation awarded to the owner.

(b) Within the meaning of this section, "goodwill" consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill, or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage.

Bills have been filed on several occasions in Massachusetts to include compensation for loss of goodwill. While this element of damage presents problems of proof, it could present a miscarriage of justice where forced removal robs a business of its trade because of the relocation.

We do not recommend the enactment of these sections, but suggest that the General Court might study the advisability of their adoption.

Comparative Law Situation

After a survey of the statutes in ten primary states, California, Colorado, Connecticut, Florida, Illinois, Maryland, Michigan, New Jersey, New York and North Carolina, and the federal statutes (40 U.S.C.A. Secs. 257 to 258 (f)) we conclude that the Uniform Eminent Domain Code has not been adopted in whole or in part in any of the jurisdictions mentioned with the exception of California. (*Compare*, UEDC, art. 3, 4 and 5 with 7 Cal. Code of Civ. P., ch. 4, §§1245.270, *as amended* by Stats. 1975, ch. 1275, §2).

It is significant to note, however, that rather than California adopting these provisions from the code, the drafters of the code drew heavily from the eminent domain law of California.

Although Massachusetts should not let the fact that no other jurisdiction has adopted the code be determinative, it is a significant factor which cannot be overlooked.

This Code is Not Needed in Massachusetts

The proposed code is a laborious recitation of many well established principles of eminent domain law found in Massachusetts cases and statutes. One of its serious faults lies in the fact that where it extends the existing law, it is unfeasible.

Its high goals are to (1) provide standards for the acquisition of property by the taking authority, (2) to regulate the conduct of eminent domain action in court, and (3) to determine just compensation. The code, if enacted in Massachusetts, would not achieve its goals. Rather, it would result in an increased caseload for already overburdened courts, duplicate a great deal of existing stat-

utes and repeal a great many others which are both well established and effective.

In the final analysis, there is no need for this model code in Massachusetts; it adds nothing significant to our law.

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